

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 2

In the Matter of

MANHATTAN COLLEGE

Employer

and

MANHATTAN COLLEGE FACULTY COALITION,
NEW YORK STATE UNITED TEACHERS a/w
AMERICAN FEDERATION OF TEACHERS, AFL-
CIO

Petitioner

Case 2-RC-21735

SUPPLEMENTAL DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held before Mindy E. Landow, a hearing officer of the National Labor Relations Board (hereinafter "the Board").

In accordance with the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the Regional Director.

Upon the entire record in this proceeding¹, I find:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

2. The Employer, Manhattan College ("the College"), is a private nonprofit college located in the Riverdale section of the Bronx, New York. It has stipulated that it has a gross annual operating revenue exceeding \$1 million. Also the record establishes that the College annually receives in excess of \$50,000 in income from the State of New York, an entity which is directly engaged in interstate commerce. Based upon the record, the limited stipulations of the parties and the considerations noted below, I find that the Employer is subject to the jurisdiction of the Board.

Because of the College's history as a Catholic-sponsored institution, I invited the College and the Petitioner to file briefs discussing whether the College was a church-operated institution exempt from the Board's jurisdiction under the Supreme Court's decision in *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490 (1979) (hereinafter "*Catholic Bishop*"). After receiving briefs and supporting documentary evidence, on October 17, 1996, I concluded that the College was a Church-sponsored institution within the meaning of *Catholic Bishop*, and dismissed the petition.

The Petitioner filed a Request for Review of that decision with the Board, which granted the petition on January 15, 1997, and remanded the case to the Region for the purpose of holding "a hearing on the issue of whether asserting jurisdiction is proper

¹ Briefs were filed by both the College and the Petitioner and they have been considered.

under *NLRB v. Catholic Bishop* . . . and on other issues as may be appropriate." In accord with the Board's order, a hearing was conducted over 30 days beginning on March 18, 1997 and ending on June 2, 1998.² At the conclusion of the hearing, the College withdrew any objection to the Board's jurisdiction under *Catholic Bishop*, and noted that it was "prepared to let any future conflicts between faith and government regulation be addressed as they may arise, and in the context of specific situations." Notwithstanding this withdrawal, the College refused to stipulate to the Board's jurisdiction.

In light of the College's refusal to stipulate to the Board's jurisdiction, I find that resolution of the *Catholic Bishop* issue is necessary in this case. See *Catholic Bishop*, 440 U.S. at 507. For the reasons discussed below, I find that the College is not a church-operated institution within the meaning of *Catholic Bishop*, and therefore conclude that the Board may legitimately assert jurisdiction over the College.

The College's History, Governance, and its Relationship with the Order of Lasallian Brothers of Christian Schools

As noted above, the College is a 4-year institution of higher education located in the Bronx, New York. The College is comprised of five schools, Arts, Sciences, Business, Education, and Engineering. Two thousand, three hundred and fifty full-time undergraduate students attend the College, along with approximately 200 part-time undergraduates and 70 graduate students.

The Order of Lasallian Brothers of Christian Schools ("the Order") founded the school in 1853 as a Catholic college, and the New York State Board of Regents

² The hearing litigated the Catholic Bishop issue and the College's contention that the petitioned-for unit consists of managerial employees inappropriate for bargaining under *NLRB v. Yeshiva University*, 444 U.S. 672 (1980).

chartered it as a collegiate institution in 1863. As the College has recognized, for its first century, it was "dominated in almost all aspects of its existence by the Brothers and by the Order." From 1863 to 1978, the Brothers controlled the Board of Trustees, comprising 61 percent of its membership.³ Until 1968, the Provincial of the Order always served as Chairman of the Board of Trustees.

Since the 1970s, however, the Order's control of, though not necessarily its commitment to, the College has lessened considerably. The Order continues to take a great interest in the College, as 20 of its 100 active members work on the campus in some fashion. The Provincial, however, no longer serves as the Chairman of the College's Board of Trustees.⁴ Also in contrast to the College's early years, laypersons constitute a majority of the Board of Trustees, comprising 29 of the Board's 35 members.

The institutional welfare and mission of the College are vested in its Board of Trustees, which also legally owns the College's property. Although most of the Trustees are Roman Catholic, the Board itself is civil, outside the control of the Church. The Board's Executive Committee is the committee most responsible for overseeing the day-to-day operations of the College. It consists of the Chairman of the Board, and several members chosen by the Chairman and confirmed by the Board as a whole. The Provincial of the Order has always served on the Executive Committee. The Provincial has also traditionally served on the Nominating Committee, which is responsible for selecting Trustees. As with his membership on the Board itself, the Provincial serves on

³ Furthermore, another three percent of the Trustees during that period were "other" clergy.

⁴ As a matter of custom, however, the Board usually elects the Provincial to serve as a member of the Board. It is within the Board's authority, however, to decline to make such an invitation.

these committees by custom, not pursuant to any stipulation in the College's charter or by-laws. Board of Trustees' meetings begin with a prayer.

The College's annual operating budget for 1995-96 was approximately \$42 million, not including an additional \$10 million for financial aid. To that budget, the Order gave approximately \$100,000, and for the entire period from 1985 to 1996, the Brothers gave a total of \$2.35 million to the College and loaned the College approximately \$525,000. The Order is also making a large gift to the school to establish a scholarship. The College receives \$350,000 per year from the State of New York in so-called "Bundy Aid." And it is not disputed that the College receives more than a de minimis amount of income, including grant money, from sources outside the State of New York.

The President of the College is currently, and always has been, a member of the Order. The College's Charter and by-laws, however, contain no requirement that a Brother serve as President; thus, a layperson is eligible for the position. Although the President of the College is under the authority of the Provincial because he is a member of the Order, the Provincial would have no such influence over the President if he were a layperson.

The College has approximately 170 full-time faculty members, including librarians. Ten faculty members are Brothers in the Order. This is a serious diminution since 1971, when Brothers constituted 20 percent of the faculty. The College asserts that it tries to hire Brothers for faculty positions, and they receive certain special benefits when employed at the College. For instance, because Brothers take an oath of poverty, their salaries are paid directly to the Order. Also, the College allows the children of faculty members to attend the College tuition-free; however, because Brothers take a vow of celibacy, the College extends this benefit to the Brothers' nieces and nephews.

The College is publicly advertised as a Catholic College in the Official Catholic Directory, a publication listing all Catholic structures, institutions, and organizations in the United States. Organizations are only entered in the directory upon the approval of the Church. Physical indicia of the Catholic faith also fill the campus, including portraits of Brothers and Catholic clerics, crucifixes in some classrooms, and statues of John Baptist de La Salle and San Miguel. Additionally, the geographic center of student activity, the Quadrangle, is framed on two sides by chapels: The Chapel of de La Salle and His Brothers, and the Memorial Hall Chapel of the Holy Infancy. The Cupola of the Chapel, featuring a cross atop, is depicted in the College's brochure for prospective students, "Manhattan College at a Glance".

The Lasallian Tradition at the College and Other Signs of Religious Affiliation

The College's teaching mission is guided by the works of Saint John Baptist de La Salle, the patron saint of teachers whose mission was to improve the quality of education to the poor. As articulated at the hearing, de La Salle is in many ways the founder of modern teaching. President Scanlan explained, de La Salle:

founded [the Order] in the period of 1680 to 1710. And he was a priest in Riems, France, and saw the need for education; really responded to a social need where there were so many poor and indigent young people . . . getting into trouble, nothing to do, little hope.

And so, he started schools to give them training and skills to enable them to get jobs. And, at the same time, he wanted to save their souls, in his language. And so, he had that mixture of a job training and a Christian education.

In order to do this, he put in things that we now, in pedagogy, take for granted, and has been called the founder of modern pedagogy. Such things as large classes. Up to that point, people were pretty much educated -- only the wealthy - - by tutors.

He taught in the vernacular; French, in that case. Again, up to that time, people basically had to learn Latin and Greek, and then study the classics in those languages.

He developed methodologies for teaching in school, grading, and promotion-evaluation assessment; developed books on the management of schools, that really have set the pace for modern pedagogy, and it [is] followed in religious and parochial and private and public schools, literally around the world.

He also had a very special sense of the role of the teacher. He talked about the teacher as, in fact, a ministry. Because the teacher, in enabling young people to develop their potential and become contributors in society, was joining . . . parents in doing the work of creation. And because of that special role [in which] he saw the teacher, the Catholic Church declared him the patron saint of teachers.

The College carries out the mission of de La Salle today, and has incorporated de La Salle into its mission statement, which reads in relevant part:

[T]he College is founded upon the Lasallian Catholic tradition of excellence in teaching, respect for individual dignity, and commitment to social justice inspired by the innovator of modern pedagogy, John Baptist de la Salle.

The mission of Manhattan College is to provide a contemporary, person centered educational experience characterized by high academic standards, reflection on values and principles, and life-long career preparation. This is achieved in two ways: by offering students programs which integrate a broad liberal education with concentration in specific disciplines in the arts and sciences or with professional preparation in business, education and engineering; and by nurturing a caring, pluralistic campus community.

According to the Chairman of the College's Board of Trustees, it incorporated the reference to "the Lasallian Catholic tradition" to emphasize its Catholic heritage and its partnership with the Order. The College requires each faculty member to sign a statement acknowledging that he or she has read the Mission Statement. The school's advertisements for new faculty include a statement denoting the College as a Lasallian institution. Furthermore, the College encourages discussions of its Lasallian mission by sponsoring Lasallian Convocations for students and faculty to discuss La Salle's teachings and legacy. Further bolstering its Lasallian Catholic identity, the College cites its relationship with the Archdiocese, its attempts to recruit students and staff by advertising its status as a Catholic college, and its academic religious studies requirement and Catholic studies major.

The College attempts to implement Lasallian principles by nurturing its students' faith and values and encouraging their ethical conduct. The College operates a campus ministry for its students, which sponsors Catholic sacramental liturgies, such as the Eucharist, Confirmation, Marriage, and Baptism. It also sponsors religious counseling and religious study groups. These programs are offered to students, but students' participation in them is completely voluntary.

Importantly, the College does not proselytize students or expect faculty to do so, even though, as President Scanlan testified, Catholic colleges are typically expected to propagate the faith. In his affidavit in the pre-hearing phase, Brother Scanlan stated that all the faculty members of the College "are required to confess their respect for and willingness to adhere to the Lasallian mission. A faculty member who feels that he or she cannot faithfully do so has no place at Manhattan College." There is no question that a faculty member who proselytizes anti-Catholic doctrine, including abortion or atheism, would not be welcome at the school. The College states that it would discipline any faculty member who actively preached against its Catholic traditions or practices; however, it has never actually reprimanded a teacher for doing so. It is notable that at the hearing every witness for the College testified that the College's mission is not to proselytize, evangelize, or convert non-believers to Catholicism. In fact, preaching for or against any religion in the classroom is inappropriate. As President Scanlan testified, proselytizing in the classroom is an affront to principles of academic freedom. As Professor Fahey of the Religious Studies Department, testified, the College promotes religious ethics, but not religious doctrine or ritual. In fact, at the hearing, of all the professors who testified, only two of them could recall any instances (three instances total) in which a class was opened with a prayer. Thus it appears the College merely

encourages Catholic students to practice more fully, and invites students of other faiths to actively practice their religions.

Teaching Requirements and Faculty Life

As noted above, faculty members agree to abide by the mission statement's adherence to "the Lasallian Catholic tradition of excellence in teaching, respect for individual dignity, and commitment to social justice." The College expects faculty to explain the Church's position on issues that arise in the course of their teaching, but it also believes that this teaching should be part of students' overall exposure to the lessons of the Judeo-Christian ethical tradition, non-Christian religions, and the secular world. The College subscribes to basic principles of academic freedom, and accordingly does not require teachers or librarians to hold or espouse specific religious dogma or obligate faculty to proselytize on behalf of any faith. Thus it appears that Faculty members at the College lead a life relatively free from Church control.

The College does not compel its faculty to attend mass or any other Catholic service, nor does it order them to participate in the Campus Ministry. Some faculty members take part in the Colleagum, an association dedicated to examining issues in Catholic academic and intellectual life; however, like the Campus Ministry, participation in Colleagum is voluntary.

The College does not make employment decisions, whether adverse or beneficial to the employee, based on an individual faculty member's faith. The College hires faculty of all religions, refusing to limit its applicant pool to only Catholic individuals. Furthermore, faculty members testified that they were specifically informed that their practice of faiths other than Catholicism would play no role in promotion decisions. Non-Catholic professors have twice won the Lasallian Educator award, which the College

gives annually to an outstanding professor whose teaching truly embraces principles of Lasallian education.

As mentioned above, many faculty members participate in the campus ministry and other church-related programs such as Colleagum. Other faculty members, however, have spoken out in favor of positions contrary to church teachings outside the classroom. For instance, Professor Joseph Fahey of the Religious Studies Department publicly challenged the Church's positions on homosexuality, birth control, and abortion. Although the College was aware of Professor Fahey's public statements, he received no discipline or reprimand. Other Catholic sponsored institutions at which Fahey taught, however, terminated Fahey's employment after his statements. Also Professor Richard Fitzpatrick of the Management Department specifically stated that he does not conform his classroom discussion to Catholic positions on controversial topics.

Church Influence on Student Life

Students at the College are overwhelmingly Catholic. A recent survey noted that approximately 75 percent of students identified themselves as Roman Catholic (although this survey did not account for the students' various degrees of devotion). Until the College's reforms of the 1970s, students were required to attend Mass and other scheduled religious activities; now, however, participation in all religious activities is strictly voluntary.

The College's Religious Studies Department had previously been known as the Theology Department, and its goal was to propagate the Catholic faith to students and the campus community. In 1971, however, the Department changed its name to the Religious Studies Department to reflect its decision to treat religion as an academic

discipline instead of a dogma to be preached and spread. As part of this change, the Department also specifically disavowed proselytizing.

To receive his or her bachelor's degree, an undergraduate must fulfill the College's Religious Studies requirement, which consists of three 3-credit classes in the Religious Studies Department. First, students must take an introductory course, "The Nature and Experience of Religion," which examines "[r]eligion as a human phenomena and its transcendent elements," "[c]ontemporary approaches to the problem of religious beliefs and faith," "the problems of religious language, myth, symbolism, and ritual", and "[t]he relations between religion and culture with special reference to contemporary questions."

After completing this introductory course in their freshman year, students take two electives in Religious Studies, one from each of two groups. The first group, "The Religious Traditions," offers students classes in Biblical Studies, Christian Theology, and World Religious Traditions. To fulfill this requirement, students can take classes as diverse as "Biblical Storytelling," "Job and Its Modern Interpreters," "The Christian Eucharist," "The Christian Mystics," "Native American Religions," "The American Religious Experience," or "Islam."

In the other required elective path, "Religion and Contemporary Thought," students may take interdisciplinary classes dealing with "Religious Faith and the Arts" or "Psychology and Religion", or they may fulfill this requirement by completing coursework on the "Ethics and Contemporary Issues" track, which offers classes such as "Religion and Social Justice," "Urban American Crisis," "Contemporary Christian Ethics," "Business Ethics," "Sexuality and the Sacred," or "Christian Marriage". The College also offers a major and a minor in Religious Studies. In 1997, the Department had 16

students majoring in Religious Studies (15 credits in addition to the basic requirement for graduation), and 75 students were pursuing a minor (6 additional credits).

Students can participate in a variety of activities on campus, including gay, lesbian and bisexual support groups, the Womyn Space open forum on abortion, and AIDS awareness day programs. Additionally, the College, through its Campus Ministry and other fora, offers students opportunities to participate in religious activities. For instance, graduates are invited to a liturgy at commencement, a mass that opens the school year, and official dinners beginning with grace before and after meals.

In *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490 (1979), the Supreme Court held that the Board did not possess statutory jurisdiction to regulate organization in "church operated" schools. *Id.* at 507. Specifically, the Court found that assertion of jurisdiction over teachers in church-operated schools posed a serious risk of impermissibly infringing on rights guaranteed by the religion clauses of the first amendment and concluded, therefore, that the Board improperly asserted jurisdiction over lay faculty at several Roman Catholic high schools. See *Livingstone College*, 286 NLRB 1308, 1309 (1987). See also *Catholic Bishop*, 440 U.S. at 504-07; accord *NLRB v. Bishop Ford Central Catholic High School*, 623 F.2d 818, 819 (2d Cir. 1980), *cert. denied*, 450 U.S. 996 (1981).⁵

The Second Circuit has recognized that "[i]t is the suffusion of religion into the curriculum and the mandate of the faculty to infuse the students with the religious values of a religious creed which create the conflict with the Religion clauses" *NLRB v. Bishop Ford Central Catholic High School*, 623 F.2d at 823, quoted with approval in

⁵ Although the Board at first declined to apply the Catholic Bishop doctrine to colleges and universities, it subsequently reversed course and extended the doctrine to institutions of higher education. See *St. Joseph's College*, 282 NLRB 65, 68 (1986).

Nazareth Regional High School, 283 NLRB 763, 765 (1987). In determining whether exercising jurisdiction over a religious institution creates a risk of infringing the employer's constitutional rights, the Board not only considers whether the institution is dedicated to "propagating a religious faith," but also the extent to which the school is operated and organizationally controlled by a religious organization. *Jewish Day School of Greater Washington, Inc.*, 283 NLRB 757, 761 (1987).

In *Livingstone College*, 286 NLRB 1308 (1987), the Board concluded that the exercise of jurisdiction would create no substantial risk of impinging the First Amendment's Religion Clauses. Of utmost importance to the Board was the absence of any requirement that faculty members at Livingstone College "conform to [Church] doctrine or promote the ideals and objectives of the . . . Church." Id. at 1309. Additionally, evidence that the school propagated the faith to students and faculty was minimal at best. Livingstone's stated purpose was not to inculcate religious principles, but rather to "foster higher education . . . , and self reliance" among its students. Id. Neither students nor faculty were required to belong to the Church or adhere to its teachings. Id. at 1310. The Church exercised no influence over course content, and the 4 credits of mandatory religion coursework were minor in light of the overall graduation requirements. Id.

In deciding that it could exercise jurisdiction, the Board also relied on the absence of Church control over the operation of the school. Livingstone College's Board of Trustees, not the Church, held title to the school's property, elected the school's president, approved appointment of faculty members, and promulgated rules regarding academic freedom. Id. at 1308. Only one-half of the trustees were members of the Church. Further, the College was not "financially dependent" on the Church for its continued operation. Id. at 1309. Thus, because Livingstone College's purpose was

"primarily secular" and it was free from interference in its daily operations from the Church, the Board concluded that "the assertion of jurisdiction [did] not pose a significant risk of infringement of the first amendment." Id. at 1310 (footnotes omitted).

In my original decision, I found that the Order of Christian Brothers continued to operate the College and to apply its religious philosophy. Thus it was noted that the College required faculty as a condition of employment to sign a statement agreeing to abide by the Mission of the College. The faculty was also required to annually reacquaint themselves with the College's Lasallian religious tradition and the meaning of Lasallian Catholic principles and aims. At the hearing, a more complete record established that the control exercised by the Order of the Lasallian Brothers of the Christian Schools has significantly diminished over the past several years. Thus, it appears that at one time the Board's assertion of jurisdiction over the College may have arguably posed a significant risk that the First Amendment will be infringed, but I believe that this is no longer the case. Based upon the record before me, it appears the College's purpose is not, in substantial part, to propagate the Catholic faith, which is a crucial factor under *Jewish Day School* in determining whether a school is "church operated." Indubitably, the Church and the Order play a strong role in defining campus environment and culture; however, in this regard, I cannot conclude that actual teaching and propagating Catholic dogma to students remains a substantial part of the College's mission.

The College's mission statement emphasizes that its purpose is solely to provide a personal educational experience "characterized by high academic standards, reflection on values and principles, and life-long career preparation," and omits any intent to propagate the Catholic faith to its students. Although the College encourages students to have a religious life, and gives them opportunities to do so, the College does not require students to practice Catholicism -- or any other religion. The College abandoned its

rules requiring attendance at mass and other sacramental celebrations in the 1960s. As a result, students may practice any religion they want, or embrace no religion at all.

This finding is underscored by the fact that faculty at the College have no duty to teach or propagate Church doctrine. Even religious studies classes approach Church dogma from an academic perspective, rather than a proselytizing one. The College asserts that it would discipline any teacher who actively campaigned against Church principles; however, there is no evidence that it has ever actually done so. Furthermore, faculty who have spoken out publicly in favor of positions that run contrary to the Church, such as birth control, abortion, and gay rights, received no punishment or adverse treatment for doing so. In short, as the Board noted in a similar case, "[t]he absence of a requirement that the faculty propagate or conform to a particular religious faith significantly diminishes any risk of impermissible constitutional infringement posed by asserting jurisdiction over the College." *Livingstone College*, 286 NLRB 1308, 1309 (1987).⁶

In the same vein, courses in Catholic theology and practice are not part of the required curriculum for College students. Instead, students are required to take three courses in the Religious Studies Department (which changed its name from the Theology Department in the 1970s to disavow proselytizing in favor of treating religion as an academic pursuit). The three religion courses required for graduation include a survey course covering religion generally as an institution, and two elective courses

⁶ The College asserts that its faculty must adhere to Catholic principles because the mission statement requires them to embrace the Lasallian Catholic teaching tradition. I disagree. As the record developed at the hearing demonstrates, the Lasallian principles of teaching, though vested with an emphasis on ethics, values, and social justice, do not require the faculty to adhere to any specific spiritual dogma that are not present in almost all modern religious and moral codes. Neither belief in Christ nor faithfulness to the Church is necessary to successfully embrace the Lasallian tradition -- as noted above, the College has twice in recent memory given its annual Lasallian Educator Award to non-Catholics.

which can be taken in areas as diverse as Catholicism, Islam, Native American Religions, Business Ethics, or the Urban American Crisis. In short, notwithstanding the College's sincere effort to impart an understanding of religion and religious values to students, the purpose of the College is not, in substantial part, propagating the Catholic faith.

Finally, the Church and the Order do not play a significant enough role in the daily operation of the College to create a true conflict with the Religion Clauses in the Constitution. The College's relationship with the Church seemingly evolves from the philosophy, culture and history of the Order rather than any institutional mandate. As noted above, the Board of Trustees, not the Church or the Order, owns the property of the College. The Trustees also control the institutional mission and operations of the College. Neither the College's Charter nor its by-laws require any member of the Board of Trustees to be a practicing Catholic. Although the President of the College is, and has always been, a member of the Order, he is so solely by custom; the Board of Trustees has the discretion to select any qualified individual for the position. Financially, the College receives a very small part of its assistance from the Church or the Order. For the 1995-96 year, the Order gave the College approximately \$100,000 towards its \$52 million dollar budget. As the College stated in its application for direct "Bundy" aid from the State of New York, it "is not, wholly or in part, under the control of any religious denomination."

Board cases finding a substantial possibility of religious infringement involve institutions dedicated to propagating a religious faith, with a greater dependency upon the charity of a religious institution than exists in the case at bar. For instance, in *Nazareth Regional High School*, 283 NLRB 763 (1987), the Board found a substantial risk that exercising jurisdiction over the school would violate the Religion Clauses, where

the school's mission was to "transmit the teachings of Jesus Christ and his Church" and the school required students to attend services and take religion courses teaching the Catholic faith. Id. at 765. Further, applicants for teaching positions were specifically asked whether they would teach Catholic doctrine. Id. Finally, demonstrating the close relationship between the Church and the school, the school's property would revert to the diocese if it ceased operating as a Catholic school. Id.

Similarly, in *Jewish Day School of Greater Washington*, 283 NLRB 757 (1987), a risk of infringement was found where the school's mission was to give students "a thorough Jewish education" so that they will "choose an intense Judaic identity" upon adulthood. Id. at 761-62. Also, religious instruction and daily worship were mandatory for students, and religion was integrated into their secular studies. Id. Finally, religion further pervaded the school's daily operation, as students were required to abide by traditional Jewish dietary and dress laws. Id.

St. Joseph's College, 282 NLRB 65 (1986), also follows this same pattern. There, the Board declined to exercise jurisdiction because faculty members signed an agreement to promote the "objectives and goals" of the religious order in charge of the institution, and were prohibited from teaching ideas contrary to the Church. Id. at 68. The Order in *St. Joseph's* also had substantial control over the day-to-day operations of the school: the college was financially dependent upon the order, half of the members of the Board of Trustees were required to belong to the order, and, importantly, the Bishop of Portland had direct control over faculty tenure and coursebook selection. Id.

The record herein before me establishes, in my view, that while the College still possesses an unmistakably Catholic philosophy and mission which derives from the beliefs, history and vision of its founding Order, it operates at the present time effectively

outside of the control and authority of either the Church or Order. I therefore conclude that the exercise of jurisdiction over the College does not pose a substantial risk of infringing the First Amendment's Religion Clauses. Accordingly, *Catholic Bishop* does not require that the Board decline to exercise its jurisdiction. See *Livingstone College*, 286 NLRB 1308, 1310 (1987); cf. *NLRB v. Kemmerer Village, Inc.*, 907 F.2d 661, 662 (7th Cir. 1990); *NLRB v. St. Louis Christian Home*, 663 F.2d 60, 64 (8th Cir. 1981). While I am cognizant of the role of the Order of Lasallian Brothers of Christian Schools in the development and formation of the College, it appears from the record, and I find consistent with the position of the Petitioner to which the College does not oppose, that it is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction in this matter.

3. The labor organization involved claims to represent certain employees of the Employer.

4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

5. As noted above, the Petitioner seeks to represent a unit consisting of all full-time teaching faculty, including librarians, employed by the College. The College, however, maintains that the proposed unit is inappropriate under *NLRB v. Yeshiva University*, 444 U.S. 672 (1980). In that case, the Supreme Court found that college faculty who helped formulate "the product" of the institution were managerial employees and therefore ineligible to receive the protections of the Act. Secondly, the Employer urges that certain of the faculty, namely department chairs and program directors, as well as the professional librarians, possess supervisory authority within the meaning of

Section 2(11) of the Act. Petitioner, takes no position with respect to the supervisory status of the faculty and, contrary to the Employer, contends that Faculty are not managerial because they do not possess authority over academic or non-academic decisions. Petitioner urges that such authority is controlled by the Administration, be it the Board of Trustees, the President, Provost or the Deans. After a careful analysis of the record, I largely agree with the Petitioner that, on the whole, the faculty sought by the petition do not possess the requisite authority to be deemed managerial personnel. I also find the record is insufficient to establish that they are supervisors within the meaning of the Act. I further find, however, that the record does establish that department chairs, who are selected from among the ranks of the faculty for limited terms, have the authority to hire and responsibly direct the work of adjunct faculty. The record additionally supports a determination that the professional library staff have direct supervisory authority for the Library's non-professional staff. Thus, these Faculty classifications are supervisory (in the case of department chairs, limited to the period of time they serve) as defined by the Act and are properly excluded from any proposed unit.

Structure of the College

The college is formally operated by a Board of Trustees, which holds legal title in the College and maintains the ultimate authority to determine college affairs. The President of the College, who also sits on the Board of Trustees, is the school's Chief Executive Officer. He is responsible for all day to day operations of the institution.

Six vice-presidents serve the President on matters such as human resources, student life, finance advancement, and facilities. The Provost, the chief academic officer of the College, functions as a Vice-President for Academic Affairs. The Provost is the

officer responsible for the College's five schools: the School of Arts, the School of Sciences, the School of Business, the School of Education, and the School of Engineering. Each of the schools is headed by a Dean, who reports to the Provost.

The Deans are responsible for the administration of their individual schools, which are further subdivided into separate departments headed by a department chair. For instance, the School of Arts has departments in English, Fine Arts, Government, History, and Psychology; the School of Science has departments of Math, Physics, and Chemistry; and the Education School has departments in Education and Physical Education. As discussed in further detail below, department chairs are selected by their individual departments to serve four-year terms. Thus, with the rare exception of circumstances where a department chair is brought in from outside the College, every department chair has been, and presumably will revert to being a "regular" faculty member. Faculty who serve as department chairs receive varying amounts of release time from their teaching to allow them to attend to their administrative responsibilities. Certain schools also have interdisciplinary programs, headed by faculty program directors. Focussing on areas such as peace studies, international studies, or urban affairs, these programs bring together curriculum from numerous departments and thus provide students with a course of study in a nontraditional discipline. As discussed below, faculty in each department are primarily responsible for the development and administration of their academic offerings. The College also employs a number of administrative personnel; as of 1991 when the College conducted a self-study in anticipation of its upcoming accreditation review there were 120 members of the administrative staff as compared with 208 members of the faculty. Similarly, an analysis conducted by Religious Studies professor Joseph Fahey (testifying for petitioner) demonstrates that during the 1996/1997 year there were 3,073 students, 176 faculty and

112 members of the administrative staff. Certain of these administrators occupy positions relating to enhanced services offered to students in areas of residential life, aid to students with learning disabilities, financial aid and technological support.

Governance Mechanisms at the College

The College Senate

The predominant governance organization at the College is the College Senate. Its present Constitution was adopted in May 1994, and ratified by the President and Board of Trustees shortly thereafter. It is an elected body, comprised of 27 full-time faculty members, 20 students, 12 administrators, 2 staff members, and 2 alumni members. Article IV of Its by-laws provide:

A: The Senate shall be the formal and official voice of the College Community and, as a deliberative body, shall have the power to initiate, formulate, and recommend proposals affecting College policy to the President and the Board of Trustees

B: The Senate shall be the primary channel through which the Board of Trustees and/or the President shall obtain a representative view on any subject affecting College policy.

C: The Senate Shall provide a forum for the formulating and expression of community opinion, and for orderly and constructive comment on any subject affecting College policy.

Thus, the Senate is concerned with issues affecting the entire college community, and passes resolutions and recommendations in those areas; the Senate, however, may not intrude on faculty hiring, tenure and promotion, and other issues of faculty welfare, or to matters pertaining solely to student life or administrative affairs. All policy proposals of the Senate must be submitted to the President who is required to act on any such proposal within three months. The President, in his discretion, may ask that the Senate reconsider a proposal or certain articles of any proposal submitted, and the

Senate may not refuse to do so. In the event the President disapproves a proposal, this action will be final; however the President must communicate to the Senate the reasons for his actions. If the proposal is accepted by the President, it is then submitted to the appropriate committee of the Board of Trustees at its next regularly scheduled meeting. If the Board of Trustees disapproves the proposal its actions are binding. If it approves the proposal, its actions are final and the proposal is promulgated by the President.

The Senate also works through its standing committees, also known as commissions, the Agenda Committee, the Educational Affairs Commission, the Campus Life Commission, and the Resources Committee. The Agenda Committee appoints members to the Standing Commissions and assigns to the appropriate commission specific proposals for the consideration of the Senate. The Educational Affairs Commission is comprised of twenty three members: eleven faculty, four students and eight ex officio officers, one of whom is the Provost. Subject to the approval of the Provost, this Commission only need "inform" the Senate of its proposals regarding: College-wide curricular offerings and degree requirements, new programs of instruction, assessment of curriculum, admissions standards and strategy, standards for academic standing and graduation, degree requirements, standards for major requirements, cognate requirements, minor requirements and electives, policies on off campus courses and guidelines for intersession and summer session and academic enhancement programs. In other areas, the Commission's recommendations are reserved for Senate action and approval. Such matters include the College-wide grading system, requirements for College-wide honor societies and Dean's lists, Course and teacher evaluations, assessment of academic administrators, faculty and other academic personnel, assessment of academic administrators, faculty and other academic personnel, the establishment, consolidation and elimination of Schools, programs and

departments, procedures for selecting principal academic officers (the Provost, the Deans and the Director of Libraries and academic support services. Additionally, standing committees on the Library and Computing report to this Commission. The Campus Life commission is comprised of five faculty, seven students, seven administrators and one staff member and deals with issues relating to student life, food service, career counseling and placement and the Campus Ministry. The Resources Commission, comprised of six faculty, two students, four administrators, one alumnus and one staff member deals with issues relating to budget formulation and review, student financial aid, capital expenditures, facilities and grounds, public relations and alumni affairs.

Council for Faculty Affairs

As noted above, the Senate has no jurisdiction over issues of faculty welfare -- those matters belong to the Council for Faculty Affairs ("CFA"). Faculty members elect representatives to the CFA. According to the CFA's Constitution, it is responsible for ensuring faculty participation in matters such as tenure and promotion status, scheduling and work load, faculty grievances, selection of department chairpersons, and budgeting of funds earmarked for Faculty use. It also has a role in drafting the Faculty Handbook. The CFA also appoints representatives to other committees, such as Tenure-Promotion, Sabbaticals, and Summer Grants. In essence, the CFA is responsible for creating nonacademic policy governing the Faculty's relationship with the College. Decisions of the CFA are forwarded to the President, who may either adopt or reject them. If he adopts the decisions, they become the policy of the College without further discussion. If he rejects a CFA action, he must explain his actions. If he takes no action within six weeks, the resolution becomes policy as if he had endorsed it. The CFA's 18 members are among the faculty constituent members of the College Senate.

Governance Organization

Evidence at the hearing adduced that a number of "ad hoc" committees, organized by the President, or by other College bodies such as the Senate and the CFA, historically have considered areas purportedly reserved to the discretion of standing college bodies. Thus, over time issues have arisen as to the specific jurisdiction of the College's governance organizations. Over the past decade the College community has attempted to address the inefficiencies and overlaps in its governance structure through a series of ad hoc governance committees, comprised of members of faculty and administration. In 1991, after a review of the operations of the College, including a self-study prepared by institution, the Commission on Higher Education of the Middle States Association of Colleges and Schools issued its accreditation report. The evaluating team commended the College for the "substantial efforts that have been made in recent years to analyze governance issues," noting that the College had undertaken a governance review, "to implement new structures for maintaining effective participation by the various college constituencies in planning and program development. The College has focused particular attention on faculty participation in institutional affairs and Presidential leadership in the area of planning has grown stronger."⁷ Nevertheless, the evaluating team additionally observed that "transition from the old to new structures is not going forward in large part because a new, integrated model of governance has not been formulated and formally adopted by faculty, administration and trustees." The review panel noted the institutional uncertainty caused by the "patchwork quilt of governance bodies, some which are temporary or improvised" and concluded that "[f]ew of the

⁷ Examples of faculty participation cited included the 1989 Ad Hoc Committee on Governance, the development of increased communication among faculty, Trustees and administrators, revisions of the Senate Constitution and the efforts to revise the Faculty Handbook "to reflect revised policies adopted via appropriate governance procedures in recent years

College personnel interviewed by team members understood the institution's governing structure, aside from the authority of trustees, president and provost."

Subsequent to the Middle States review the College adopted its recommendation that the College form another task force to complete the governance reorganization process, and established another ad hoc governance committee.⁸ One of the committee's guiding principles was that the governance structure be as "flat" or as "non-layered" as possible. In 1993 the committee issued a report containing a number of recommendations.⁹ This committee, however, did not have independent authority to implement its proposals and its report was given to the Administration, the Senate and the CFA. The Senate then created its own governance committee to consider these proposals and to generate others. This committee, comprised of two faculty members, two students and two administrators, recommended that the Senate adopt certain recommendations, which were largely reflected in the May 1994 amendments to the Senate Constitution. The CFA, on the other hand, rejected the recommendations of the ad hoc governance committee with respect to those issues impinging on its jurisdiction. Although the streamlining of the governance structure was clearly intended to ameliorate confusion regarding governance jurisdiction, a number of faculty, who testified on behalf of the Petitioner, stated that in their experience, the observations of the 1991 Mid States

⁸ This committee was comprised of the President, the Provost, Dean Suarez, the Dean of Students, the speaker of the Senate, the Chair of the CFA, six faculty members, two administrators, two staff members and one student.

⁹ These recommendations were: to eliminate or combine unproductive and/or poorly-defined committees; to re-align committees; to re-constitute the faculty membership on the College Senate to nine representatives appointed by the CFA and 18 faculty members elected by the faculty at large to redefine the committees of the Senate and the Council on Academic Affairs; to create a Dean's Council (a committee consisting of department chairs and the Dean) at each school to handle matters such as curriculum, faculty development and grants of sabbaticals; to establish a College-wide Council for Budgeting and Finance; and to establish a College-wide Benefits Committee.

assessment team remained an accurate description of the state of the governance structure at the College.

The Faculty Handbook

The Faculty Handbook governs virtually all respects of the Faculty's relationship with the College. The CFA, working with the Provost, began efforts to revise the 1979 edition of the Handbook in the 1990-1991 academic year as part of the preparation for the 1991 Middle States self-study. The CFA subsequently divided into a series of subcommittees to work on the Handbook and submitted a draft to the Provost in March 1993. Subsequent to the Provost's acceptance of the draft, in May 1993, the CFA issued a newly-revised version of the Handbook (called Version 3.2) which updated the so-called "contractual" portions of the 1979 Handbook, (which to this day remains the only version of the Handbook which has received the imprimatur of the Board of Trustees.) Those provisions of the Handbook dealing with faculty rights, status and duties were revised. Other sections, which consisted of descriptive materials about aspects of the College's operations, remain the same. The changes incorporated into Version 3.2 fall into two major areas: (i) layout and stylistic modifications (which appear to have been extensive) and (ii) a revised text which incorporated policies which, over the intervening years, had been adopted by the CFA and the College, amendments to conform to legal obligations and requirements and new sections on professional ethics, sexual harassment, faculty development opportunities and examinations.

Restructuring of the College

At the faculty convocation in the Fall 1992, then-Provost Emge proposed a reexamination of the College's four school format (Schools of Arts & Sciences, Engineering, Education, and Business), and suggested replacing it with a three school

structure, which would consist of schools of Arts & Education, Engineering & Science, and separate School of Business. Provost Emge expressed the view that this reorganization would allow for greater curricular unity among the College's schools, and make it easier for undergraduates to take courses in schools other than their own.

In response, the Council for Faculty Affairs immediately sent a request for additional information about the proposal to the President and Provost, arguing that "since [reorganization] so centrally involves academic matters, the faculty must be, and wishes to be, centrally informed." The letter concluded by informing the President and Provost that "the members of the [CFA] will consult the various faculty which they represent to gather their views" on reorganization. Chemistry Professor Richard Kirchner then suggested organizing a steering committee to amass data and coordinate reorganization efforts. His suggestion was followed, and the Steering Committee for Reorganization was formed with Professor Kirchner as Chair. The CFA, on its own initiative, approved the Steering Committee's initial membership, and suggested adding more members for better departmental representation. After some negotiation, the CFA's suggestion was adopted, and the committee membership was set at 16, with 13 faculty members, the President, the Provost, and a member of the Board of Trustees.

Working outside of the Steering Committee, groups of faculty members began drafting restructuring proposals of their own. In addition to the Provost's initial three-school plan, faculty proposed a variety of other academic structures: a separate School of Mathematics and Science; two schools, one of Humanistic Studies and one of Professional Studies; one that strengthened the Education school; and one that eliminated the school structure altogether. In response to these proposals, on November 2, 1992, the Steering Committee issued a memo encouraging the faculty to continue their independent work on restructuring, setting forth issues that proposals

should address, and promulgating guidelines for submitting proposals to the Steering Committee.

In conjunction with the CFA, on January 25, 1993, the Steering Committee distributed a lengthy packet to the faculty, containing copies of the proposals received to date, and requesting faculty input. The Steering Committee advised the faculty that the original three-school proposal suggested by Provost Emge as well as the "no school" proposal had been withdrawn from consideration, due to a general lack of support. The results of this polling were released to the faculty on March 4, 1993. After narrowing the proposals, the CFA and the Steering Committee initiated another round of faculty polling on March 17, 1993, and announced that, after this round of polling, it would draft a report on the reorganization issues and dissolve.

The CFA responded by urging the Steering Committee to continue its work. The committee agreed, and added the Dean of Arts & Science and the Dean of Education to its ranks to ensure that those schools would be represented as the committee discussed breaking down curricular barriers between those disciplines. The Steering Committee decided that, it would release a report at the end of its deliberations to the CFA, the College Senate, the Administration, and the Board of Trustees. Professor Kirchner noted his view that any final decisions regarding reorganization would be made by the Administration and the Board of Trustees.

On May 4, 1993, the Steering Committee issued its final recommendations. Specifically, the committee proposed organizing the College into five separate schools, Arts & Social Sciences, Education & Human Services, Science & Mathematics, Business, and Engineering. The committee also proposed the establishment of a "Coordinating Committee for Arts/Social Sciences, Science/Mathematics, and

Education/Human Services" to harmonize concerns relating to those three schools. On May 3, 1993 and May 18, 1993, respectively, the College Senate and the CFA endorsed the Steering Committee's recommendations. The CFA had conducted a third poll of the faculty and found that the faculty overwhelmingly supported the proposed structure.

On June 24, 1993, President Scanlan announced that, after much debate, the Board of Trustees accepted the recommendation of the Steering Committee. The Board approved the proposal on the condition that, by June 1994, the College establish curricular unity by creating an Arts-Education-Science Council, approving an collegewide Core Curriculum, and eliminating course duplication and curriculum barriers. These requirements were satisfied, and the new school structure was in place by the Board's June 1994 deadline.

As the reorganization process was becoming finalized, there emerged some tension between the Senate, the CFA and the Board of Trustees regarding their relative spheres of authority. In the Spring of 1993 the Senate, and the CFA, came to believe that the Board of Trustees was planning to act on reorganization before the CFA and the Senate concluded their review of the matter. On April 26, 1993, CFA Chair George Prans wrote to the Board of Trustees requesting that no decision on restructuring the schools of the College be taken by the Board until responses to the final report of the Steering Committee from the Senate and the CFA were available. In support of its request, Professor Prans noted that the issue of restructuring warranted the "collegial efforts of the entire College community." Although the letter was addressed solely to the issue of reorganization, it became viewed as pertaining to larger issues of power and authority. On June 10, 1993, Martin H. Schmidt, Chair of the Board of Trustees, wrote to Professor Prans and Professor Manduley, speaker of the Senate, in response to the April 26 letter, seeking to correct "inaccurate interpretations of Manhattan College's

governance in some segments of the campus community." The letter set forth the Board's position regarding the role of other College constituencies with respect to matters within the Board's purview.¹⁰ The letter states, in part:

...Unfortunately and inexplicably, there now arises a misunderstanding that this new avenue is [1] somehow the only avenue of input and [2] even the President and the Board must traverse it. To suggest that the President first traverse this avenue before bringing matters to the Board is not only to inappropriately impinge on presidential prerogatives but also hinders the proper functioning of the Board and, de facto, displaces the Board as the central decision-making body of Manhattan College...

[A]ny action initiated by the Senate must be approved by the President and by the Board. There is no reference anywhere in our College governance documents to suggest the opposite is true...

Notice the absence of any reference to prior consultation with the Senate. Nor is there a reference to the Council for Faculty Affairs, whose Constitution clearly delimits its purview. Thus, the proposition that the College budget, creation of new schools, etc. must first be acted upon by the Senate is totally untenable...

The Administration and Board firmly believe in the value of collaboration and the wisdom of consultation. Indeed, we would be foolish not to consult as widely as appropriate to benefit from the experience and expertise that lies in the College community. Such consultation and collaboration is especially appropriate with the Faculty who serve a special role in the College and are critical to its well-being...

There are issues and situations where the Senate would be the best vehicle for such consultations [Article IV, C indicates that that the Senate shall provide a forum]; other issues and situations where the Council would be the appropriate forum; still others where direct dealing with the Faculty of the School[s] would be the best forum; still others where none

¹⁰ The Board's By-Laws authorize it, among other things to:

Approve and adopt all major changes in educational policies and programs of the College;

Enact and amend rules and regulations for the orderly government of the College, including procedures for the enforcement of the same;

Authorize, adopt, approve and monitor the annual budget of the College;

Maintain the reserved power to approve policies affecting faculty, administration, staff and students of the College, especially but not limited to those policies that substantially affect the future financial status of the College.

of these are preferable and a special committee should be formed; unfortunately, there may be circumstances where the exigency of a situation requires quick decisive action by the President and the Board that precludes even elementary consultation; and, inevitably, there will be obviously unpopular decisions that are mandated by the circumstances and it is hard to see how the community's acceptance would be enhanced by first formally recording the degree of disfavor. Thus, judgments that the Steering Committee on Reorganization, proposed by the Chairpersons of the Arts and Sciences and accepted by the Administration, was not the best vehicle are valid opinions and should be part of our review to insure continued growth and effectiveness; statements that proper procedures were not followed are simply inaccurate.

The Board reaffirms our respect for the Faculty and our commitment to consultation and collaboration. Since "good fences make good neighbors," it is our hope that correcting misinterpretations will facilitate harmonious collaborations so that the future progress and well-being of our beloved Manhattan College can be insured...

Notwithstanding the positions taken in this letter, the Board of Trustees did not act on the issue of reorganization until the Steering Committee released its report thereby endorsing the five-school model which was favored by the faculty.

The Faculty's Role in the Academic Sphere

As Petitioner notes, applicable portions of the Regulations of the Commissioner of Education (Concerning Registration of Programs of Study at Degree-Granting Institutions and Non-Degree Professional Schools) for institutions within New York State provide that:

For each curriculum the institution shall designate a body of faculty who, with the academic officers of the institution, shall be responsible for setting curricular objectives, for determining the means by which achievement of objectives is measured, for evaluating the achievement of curricular objectives, and for providing academic advice to students. The faculty shall be sufficient in number to assure breadth and depth of instruction and the proper discharge of all other faculty responsibilities. The ratio of faculty to students in each course shall be sufficient to assure effective instruction.

The record establishes that the faculty of the College, acting primarily through various committees, has substantial influence and control over issues of course content, and a variety of other academic and curricular matters.

Course Content

Initial course development is within the province of the faculty. In the School of Arts, for example, faculty members propose new courses to their departmental colleagues based on broad guidelines developed in the School's faculty-elected and chaired Curriculum Committee. If the department approves the proposal, it will present the course to the Curriculum Committee for its authorization. In the School of Business, on the other hand, course development begins and ends at the departmental level, with individual faculty members proposing courses for their department's approval.

To propose a course, faculty members develop a title, goals for the course, prerequisites and corequisites, and required readings. Professors proposing new courses usually create a syllabus, and explain how students will be graded. Faculty must justify the new course to their colleagues, explaining why it is necessary, whether the College has sufficient resources to teach the course, and whether there is sufficient student interest to support its offering. Once a course is approved, future revisions are within the authority of its teacher. Faculty members may change and revise course content, titles, sequencing, and grade-level. The College's faculty play a similar role in course development for the graduate programs.

Curriculum

The College takes a multilayered approach curricular decisionmaking. Individual departments, schoolwide committees, and collegewide bodies all play significant roles regarding curricular decisions affecting their respective constituencies.¹¹

Collegewide Curricular Decisions

The College has a "Core Curriculum," which students in every school must complete as a prerequisite for graduation. The Core Curriculum consists of coursework in basic writing, religious studies, social sciences and natural sciences. It also allows students to take liberal arts electives. The Core Curriculum was designed by an ad hoc task force, with representatives from the faculty and students of each of the five schools, and was approved in 1994. Maintenance of the Core Curriculum is in the hands of collegewide bodies such as the Educational Affairs Commission and the College Senate.

The Board of Trustees mandated that inter-school curricular matters also be considered by the Arts, Education, and Science Council to insure curricular unity among the three schools when it permitted Arts and Science to divide. The Deans of the three schools, as well as eight faculty, apportioned among the various schools, serve on this committee.

¹¹ Governance documents of the College, such as the Constitutions of the Senate and Council for Faculty Affairs, make reference to the underlying principle of "subsidiarity" (or decentralization). Under this theory, decision-making is made at the most closely-related and competent level. This concept applies to academic decision-making as well. Thus, curricular matters relative to particular departments or Schools are resolved at those levels.

Curriculum Decisions Within the Individual Schools

School of Arts:

The School of Arts covers a wide range of academic disciplines, including English, Psychology, Religious Studies, Peace Studies, and Government. To coordinate curricular issues for all of these diverse subject areas, the School of Arts established a Curriculum Committee, against the recommendation of the College's Ad Hoc Committee on Governance, which recommended that schools convene committees of Department Chairs to decide curricular issues. The Curriculum Committee, governed by a set of formal by laws drafted by the School of Arts, consists of seven faculty members, five of whom are elected by their peers for a three year term of office. The remaining two faculty members are the Directors of the Core Curriculum program and the Writing Across the Curriculum program, who are appointed by the Dean. The committee members elect a chair from among their own. Dean O'Donnell of the School of Arts sits on the committee as an ex officio member, she attends meetings, but does not vote.

The Committee considers matters covering a wide variety of areas which include approving new courses, seminars, and degree requirements proposed by departments; developing schoolwide degree requirements; writing guidelines for the development of new courses; establishing rules for the use of films in class; and spearheading other such projects. The Curriculum Committee may also convene meetings of the entire faculty to discuss proposals relating to the School of Arts as a whole. Members of the Committee negotiate with their counterparts in other schools when the other schools make decisions impacting courses in the School of Arts. For example, when the School of the Business eliminated a requirement that its students take a course in Government, or when the School of Science reduced its foreign language requirement, members of

the Curriculum Committee met with faculty in the two schools to lessen the effect of the change on the School of Arts.

According to the Committee's by-laws, its decisions are referred to the Dean of the School of Arts for her to adopt, reject, or remand to the Committee for further discussion. The Dean, however, testified that she has never outright rejected a Curriculum Committee decision, and only once remanded a decision to the Committee. Once the Committee has approved a proposal and received the Dean's approval, its actions are final.

The School of Arts also has a Committee of Chairs and Program Directors, which consists of the Dean and her department chairs and program directors, as the name implies. This committee has a broader agenda than the Curriculum Committee, and tends to deal with more administrative tasks. Thus, the Committee of Chairs and Program Directors has discussed internships, summer sessions, acceptance of credits from community colleges, and other school-wide issues. It does appear, from a review of the minutes of both committees, that there is overlapping jurisdiction; however, the Committee of Chairs and Program Directors apparently reviews the actions of the Curriculum Committee rather than approve or reject them.

The faculty do not have absolute control over academic issues. The Dean must approve various actions, including giving a grade of incomplete or giving credit for internships or independent studies. Any variances in curriculum or permission to take courses off campus must also be approved by the Dean. In one instance, the Dean refused to accede to a program director's decision to allow students to apply a single course to more than one concentration. The professor asked the School of Arts Curriculum Committee to examine the question, and the Curriculum Committee referred

it to the Committee of Chairs and Program Directors (of which the professor is a member) for review. There is no evidence to suggest that the Dean took any action to remove the question from consideration by either committee.

The Curriculum Committee has refrained from interfering with matters it believes are best left to departmental decisionmaking, such as course numbering, scheduling, or granting course credit for majors and minors. Additionally, as alluded to above, departments take the lead on developing their own course offerings and degree and program requirements.

School of Science:

The School of Science consists of four departments, Chemistry and Biochemistry, Biology, Physics and Math and Computer Science. In 1993, after the College's reorganization separated the School of Science from the School of Arts, the School of Science adopted the format for making curricular decisions suggested by the ad hoc Committee on Governance, and established a Dean's Council. The Dean's Council is comprised of the Dean of the School of Science and the four department chairs. The Dean's Council has jurisdiction over course approvals, curricular issues affecting more than one department within the school, and school-wide degree requirements and curriculum. Unanimous votes among the Department Chairs in the Dean's Council are binding on the Dean; 3-1 or 2-2 votes are treated as merely advisory.

Dean Edward Brown, who has served as Dean since the School's establishment after the reorganization, testified that, before voting on a substantive matter and major changes, the individual department chairs consult with faculty members in their department to solicit their views, particularly with respect to matters involving School-wide required courses. For instance, a proposal to eliminate the School of Science's

foreign language requirement received significant attention from faculty outside of the Dean's Council, and was similarly not popular with the School of Arts' Curriculum Committee. The faculties of the various departments had differing views on whether the elimination of the requirement should be effectuated. After almost one year of consideration and faculty input, the Dean's Council voted to retain the requirement. Dean Brown further testified that the Dean's Council also rejected President Scanlan's requests to add the School of Arts' Global Origins course to the science curriculum and to change the focus of certain science courses to give them a more modern application.

Notwithstanding the authority of the Dean's Council, faculty in the individual departments retain significant control over their curricula. Thus, department faculty have the sole authority to revise the requirements for majoring in its programs; reduce required classes and increase elective classes; establish prerequisites; draft class schedules; choose class offerings; and redesign science courses for students in other schools who are taking the class as an elective. These matters do not require the approval of the Dean's Council, though the Dean's Council may be informed that the decisions have been made.

School of Education:

The School of Education has two departments, Education and Physical Education, plus a program in Radiological and Health Sciences.¹² The School also offers graduate degrees in Education and Physical Education. For curricular matters, the School adopted a Dean's Council. Members of the School of Education's Dean's

¹² The School of Education offers graduate as well as undergraduate degrees. One faculty member serves as the Program Director for Graduate Education, coordinating the graduate degrees in Special Education and Counseling. Another faculty member coordinates the Graduate Program in School Administration.

Council are the Dean, the two department chairs, the program director, and, after their selection, two department chair-elects elected to serve starting in the Fall of 1997. The Council has no formal by-laws or constitution, and works by consensus, taking voice votes only on an occasional basis. The School of Education also has at least four general meetings of the entire faculty each academic year at which curricular matters are discussed.

The Council deals with curricular issues affecting the School as a whole. Like its counterparts in other schools, it also approves new courses and programs after their initial development by individual departments. For instance, the Education Department was obliged to create an Elementary Education Program after it ended its affiliation with the College of Mount Saint Vincent's program.¹³ The faculty member serving as department chair at that time drafted an interim plan, which was approved by the Dean's Council. When new Elementary Education faculty were hired, the new faculty drafted a substantially new program, which the Dean's Council -- as well as the State of New York -- approved. No central College committee was required to approve this plan, as it was not a new program but rather a revision of an existing one. Furthermore, as in the Schools of Arts and Science, faculty on the Dean's Council negotiate with their peers in other Schools, and with representatives of the collegewide Core Curriculum, when issues overlap. For example, a proposed course entitled "School and Society" was found to be almost identical to a course offering in the School of Arts. Initially, the Arts, Education and Science Council (created by the Board of Trustees as a condition of the reorganization to five schools) considered the issue, but referred the matter to the

¹³ The College and the College of Mount St. Vincent jointly administer several programs.

departments. The matter was resolved when the School of Education decided it would not offer the course.

Occasionally, the School will convene ad hoc committees to deal with unique curricular issues. An ad hoc faculty committee recently analyzed whether certain undergraduate programs should continue to require students to write a final paper or thesis. The committee decided to continue the requirement, and drafted a set of guidelines to govern research courses. The Dean disagreed with some of the guidelines, but implemented them nonetheless.

In the School's graduate programs, course and program development similarly rests primarily with the faculty, who in conjunction with the program directors, develop and revise curriculum. At one point the New York State Education Department increased the requirements for certification of school counselors. The graduate faculty determined to leave the master's degree program as it was and incorporate these increased requirements into its post-masters Professional Diploma course of study.

School of Engineering:

Like the Schools of Science and Education, the School of Engineering adopted the Dean's Council framework to handle its schoolwide curricular issues. The Council consists of the Dean and the chairs of the five departments in the Engineering School. According to the Dean, the Dean's Council makes decisions by consensus or majority vote among the department chairs. The Dean himself does not vote.

The Engineering School's Dean's Council has jurisdiction over similar areas to other Dean's Councils. It has discussed required courses for its undergraduate students; graduation requirements for students in the School; initial approval of new

degree programs within the School. Each individual department retains significant autonomy regarding its own curriculum. The current Dean of Engineering, an electrical engineer, was recruited from another school of engineering and took office in 1993. At that time he brought with him several proposals to modify curricular issues in the School. New courses and programs he wished to implement included the creation in each department of a "company course" -- designed to give Engineering students practical, real-world experience, a "seamless masters" degree sequence designed to let students earn concurrent bachelor's and master's degrees in a single five-year program, a reduction in the number of credits required to obtain an engineering degree and a School-wide freshman Engineering course. These proposals were considered both on the departmental and School-wide level. The Dean's Council approved the School-wide freshman engineering course, and the other proposals were eventually implemented by some departments within the School, but not by others.

Again, like their colleagues in the School of Education, the various department chairs caucus with their faculty before making serious decisions. The faculty are kept informed of Dean's Council activities through detailed minutes which are distributed to them via e-mail. Additionally, the School has held three faculty forums, which allow the faculty to give their input on ongoing curricular matters.

School of Business:

The School of Business has three departments each headed by a chairperson: (1) Accounting, Law, and Computer Information Services, (2) Economics and Finance and (3) Marketing and Management. The School also has a graduate education program, which awards a Masters in Business Administration. The department has a

Dean's Council, however, unlike its counterpart in other schools, this body primarily focuses on the scheduling of courses.

A Curriculum Committee resolves curricular issues within the School of Business. The Committee consists of seven members: the Dean, the chairs of the three departments, plus an elected faculty member from each department. The Committee deals with the same issues as its counterparts in other schools: classes required for a School of Business degree, prerequisites, credits required for graduation, and similar issues. The Committee has also discussed issues raised by the entire faculty at a schoolwide retreat, such as adding honors courses to the curricula for all schools, adding courses on information services, changing the timing of certain courses from a student's junior year to his sophomore year. Also similar to other Schools, departments retain control over matters important to only them, such as requirements for their degree programs, scheduling, and initial course development.

The MBA program has a Graduate Curriculum Committee. The Director of the MBA program and various faculty members sit on this committee, which basically carries out the same duties as its undergraduate equivalent.

Admissions

The faculty's participation in the undergraduate admissions process is limited. It does not set admissions standards or acceptance rates. Nor does the faculty review applications or select particular applicants for admission. Instead, the admissions process is managed by the Dean of Admissions and Financial Aid who reports to the Vice-President for Student Life.

Faculty members write material for admissions brochures and web sites aimed at attracting prospective students. They also attend various open houses and admissions events. Several departments in the School of Science, in an effort to attract well-qualified students, have developed (and administer) competitive scholarship examinations. The College awards the winner of these competitions a full-tuition scholarship. Departments in the School of Engineering have also engaged in their own outreach programs to encourage students to matriculate as freshman and transfer students.

The Faculty's influence on graduate admissions is more substantial than on undergraduate admissions. In the School of Education, for example, applications for admission to the graduate program are forwarded to the director of the program after receipt in the College's main admissions office. The director, who is a member of the teaching faculty, reviews the applications and makes a recommendation on admission to the admissions office. The admissions office relies on this reference in its decision whether to admit the applicant. The School of Business's MBA program operates in a similar fashion: the admissions office forwards applications to the director of the MBA program, who reviews them with an eye toward admissions standards established by the faculty. In one instance, the program director increased the admissions standards after complaints from the faculty about the poor quality of recently admitted students. Like in the School of Education, the MBA program director makes recommendations on applicants to the admissions office, which usually follows his suggestions. Finally, faculty in the School of Engineering established a minimum grade point average to allow undergraduates to enter a "seamless masters" program which enables them to receive their bachelors and their masters degrees in a consolidated five year program.

Other Academic Issues

Grading

Course grading is a matter left to the discretion of the course instructor (although general grading policies are within the jurisdiction of the curricular committees described above). Under college policy, if a student is displeased with a grade, the student must first discuss the grade with the faculty member. If the student and the instructor cannot reach an informal resolution, the student may discuss the matter with the department chair. Finally, the student may ask the dean to review the grade. For a grade to be reviewed, the course instructor must be in agreement. Thus, even if the dean is sympathetic to the student's plea, the course instructor must also concur for any change to be made. There are certain areas in which the faculty's decision is not absolute. For example faculty must obtain the permission of the dean prior to giving a student an "I" (incomplete). Similarly, faculty must obtain permission from their dean to waive a final examination in a course, even if that faculty member believes that the administration of such an exam is contrary to the teacher's pedagogical objectives.

Attendance Policies

Again, general schoolwide policies encouraging attendance are within the discretion of the various curricular committees and the EAC. The College requires "responsible attendance," and faculty must report students after four unexcused absences. However, individual instructors also have power to set their own policies regarding the impact of absences on student grades. Furthermore, the course instructor has the sole authority to decide whether to give absentee students makeup tests.

Academic Dishonesty

The College has a schoolwide policy against academic dishonesty. The Judiciary Committee on Student Affairs, a joint faculty/student/administrator body, investigates and resolves claims of academic dishonesty. More often than not, however, incidents of academic dishonesty are handled on an informal level by the instructor of the class.

Academic and Professional Advising

Faculty members provide advising services to students in both academic and professional contexts. Academically, undergraduates are assigned a faculty advisor to mentor them through the matriculation process. The Psychology, English, and Education departments have prepared written handbooks for their students on this process.

The College has also established Pre-Med and Pre-Law advising committees, on which faculty members serve to help students choose schools to which they should apply and assist them in the preparation of their applications, members of the committee also draft necessary faculty recommendations. The Education school faculty also help place students in post-graduate positions.

Tuition

The faculty plays no appreciable role in setting tuition rates at the College.

Class Size

The College has set general guidelines regulating class size. These guidelines set forth four categories of enrollment caps. The caps vary depending upon the difficulty of the class, the frequency of writing or lab assignments, and other factors affecting

students' ability to learn in larger sections. Under these guidelines, faculty must request higher or lower caps for the classes they teach, or for no cap at all. The Dean of the faculty member's school has the discretion to grant or deny such requests.

The Faculty's Influence on Non-Academic Matters

Hiring

Tenure-Track Faculty Hiring

Faculty rank is described and defined in the Faculty Handbook. Full-time teaching faculty may be employed in the rank of instructor, assistant professor, associate professor and professor. Like most aspects of decision-making at the College, tenure-track faculty hiring procedures vary from school to school and department to department. The testimony, however, revealed a general pattern of hiring that the school tends to follow.

The process begins when a department's chair or its faculty collectively identify the need for a new, tenure-track position, often created by the departure of an incumbent faculty member. Once the department decides that hiring is necessary, the chair, on behalf of the faculty, will make a formal hiring request to the School's Dean for hiring authority. If the Dean concurs, he or she will pass on the request to the Provost. Former Provost Emge testified that he approved all but two of the requests for hiring authority he received in his 11-year tenure as Provost. President Scanlon testified that, due to the financial exigencies facing the school in the early 1990's, the College determined it necessary to reduce the number of faculty (as well as other staff) and this was achieved primarily through attrition. Thus the President, in conjunction with the other

vice-presidents of the College, reviewed all vacant positions and determined in each instance whether it should be filled or eliminated.

Once hiring authority is granted, the department will draft a position description setting forth the required background, areas of expertise, hiring level, and other requirements for the position. Then, in conjunction with the College's office of Human Resources and the faculty of the department, the department chair will place an advertisement in professional and academic publications. In response to the ad, the department will receive dossiers and curricula vitae from interested candidates. The applications are reviewed, and the most promising candidates are invited for an on-campus interview with almost all department faculty. The candidates are also often interviewed by the school's dean. The candidate may be asked to teach a sample class or presentation for students and departmental faculty.

After the on-campus interviews, the department faculty will either select a candidate, or rank-order its preferred candidates, and notify the Dean of its choice. There is no evidence that a Dean has ever denied a Department their choice of candidate. The Dean then forwards the candidate's name to the Provost for final approval. Professor Emge, the former Provost, testified that he had never rejected a department's selection for a position. The Dean communicates to the Department Chair the terms of the job offer, such as faculty rank and salary; however most appointments are made at the Associate Professor level.¹⁴ Once a candidate receives approval from the Provost, the Department Chair makes a formal offer. The foregoing process is conducted by different people, depending on the department. In smaller departments,

¹⁴ Provost Emge testified that on one occasion he suggested offering one candidate with significant experience an appointment as the Associate Professor level. However the faculty decided to keep the position at the Associate Professor level as initially advertised.

such as those in the School of Engineering, the entire faculty participates in the hiring process by helping to develop the position description, approving the advertisements, reviewing the applications, and selecting an applicant for the position in faculty meetings. In larger departments, such as English in the School of Arts, the faculty establishes an Ad Hoc Committee on Hiring, which carries out hiring duties on behalf of the entire department.

Petitioner offered evidence of certain situations which questioned the College's "hands off" stance towards departmental hires. First, in 1990, the English Department interviewed several candidates at a time when it only had authorization to fill one position. Its search narrowed down the candidates to three equally qualified finalists, one of whom was a member of a minority group. The Department sent the names to the Provost, along with a request for authority to make two offers, instead of the single position that had been previously approved. The Provost, upon receiving this request, sent a strongly worded letter to the Department, essentially agreeing to approve the additional hiring request, as long as one of the two offers went to the minority candidate. (The English Department, at that time, had no minority faculty.) The Department acceded to the Provost's demand, and hired two faculty members.

The President of the College has attempted at times to place Christian Brothers into faculty positions outside of the normal application process. The President, a Christian Brother, views the hiring of additional members of the order as analogous to an "affirmative action" policy of the College. Both times where the President asked departments to hire specific Christian Brothers, the individual departments objected. In the first instance, the Religious Studies department rejected the President's suggestion that a specific Brother be hired for the open position. He was not hired. In the second situation, the President asked the English Department to hire a Brother. The department

rebuffed his request and continued with its own search. The English Department eventually hired the Brother in question, but only after it made offers to two other candidates who declined the offers.

Non Tenure-Track Faculty Hiring

The Adjunct faculty is comprised of part-time instructors and is not part of the proposed bargaining unit. Most departments maintain a roster of adjunct professors, who are hired on an "as-needed" basis. The responsibility for checking the credentials of and hiring adjunct faculty for any particular department falls to the department chair. Similarly, the department chair determines whether or not to rehire the adjunct. The department chair is primarily responsible for determining which particular classes an adjunct will teach. Visiting faculty members, hired in a similar fashion, are meant to temporarily replace professors on sabbatical or academic leave or to provide course offerings on a limited basis, for short, fixed periods. Lastly, two professors have been hired for 3-year, non-tenure track positions in the School of Engineering. These individuals are considered regular faculty in all respects, but will not be eligible for tenure unless additional tenure-track positions can be justified either by an increase in student enrollments increase or faculty departures. Although the exact circumstances surrounding these two hires are somewhat ambiguous, it appears that they constituted a compromise between the School and the President's office. The School of Engineering had been suffering from low enrollment, and the President (and possibly the College Administration at large) did not believe that full-tenure track positions were viable.¹⁵ The faculty took the position that the offer of a one-year visiting appointment would not result

¹⁵ There is a significant institutional concern with having departments with too many tenured positions as such a situation does not allow for retrenchment in the face of financial or other exigencies.

in the same caliber of applicant. Thus, as President Scanlon testified, rather than hiring low quality faculty for a one-year term contract, the President and the School compromised by hiring a higher quality faculty member for a longer three-year contract, which would allow the incumbent to apply for tenure-track positions as they arose. Civil Engineering Professor Nicholas Morris asserted that his department was never given a reason for the non-tenure track, and that it had been presented to the faculty by the Department Chair as a *fait accompli*. There is no evidence of any consideration of this matter in either the College Senate or the CFA.

Hiring & Appointment of Academic Administrators

Faculty members have traditionally been members of the search committees for Deans and the Provost. In 1992, the College Senate, with the approval of the Board of Trustees, created a formal structure regarding search committees for academic administrators. Under the policy, a search committee for Provost is comprised of 10 faculty, 3 administrators, and 3 students; for a Dean, the committee consists of 10 faculty, 4 administrators, and 3 students. When searching for a Director of Libraries, the committee seats 10 faculty members, 2 librarians (who are also members of the faculty), 4 administrators, and 3 students. The faculty representatives to these committees are elected by their peers. The committee is in charge of the search process, and concludes its business by forwarding a list of acceptable candidates to the President for his final selection. This structure has been used in all searches since its adoption in 1992, except for the selection of the School of Education's Dean Barnett, who, as President Scanlon testified, was appointed with the consensus of her colleagues and the campus community upon the unexpected death of her predecessor.

The President experienced a less harmonious situation regarding his selection of the Dean of the School of Science. Although the faculty preferred one candidate, it was widely known that the President wished to appoint another faculty member, and wished to do so as quickly as possible. As a result of a faculty petition, Dean Brown was appointed Acting Dean for a one-year term. After this temporary appointment took effect, a formal search was undertaken in accordance with the Senate policy and Professor Brown was one of the finalists recommended to the President, and appointed thereafter. Since the enactment of the Senate procedures, the College has seen the retirement of Provost Emge, and the appointment of Dr. Weldon Jackson. The search for the new Provost was conducted in accordance with these procedures.

Faculty involvement in the selection of President Scanlan, in 1987, was a bit more contentious. The five faculty members of the search committee were directly appointed by the Board of Trustees, rather than elected by their peers. Some faculty members felt that the Board of Trustees selected particular faculty members to ensure that the next president would be a member of the Christian Brothers. Although the other members of the faculty were able to voice their concern in writing, and at an open forum scheduled to solicit community input on the search process, the Presidential-search committee did not add any faculty-selected professors to its numbers. When President Scanlan was up for reappointment in 1996, the Board of Trustees merely contacted the Chair of the Council for Faculty Affairs for his input on behalf of the faculty. Although the Board subsequently agreed to meet with representatives from the CFA and Senate, other members of the faculty objected on the ground that a broader sample of their numbers -- if not the entire faculty -- had not been consulted on the issue of President Scanlan's reappointment. To date, there is still no formal consultative role for the faculty in the presidential selection process.

Selection of Department Chairs

Department Chairs are selected by the School's Dean with varying amounts of input from the department's faculty. Generally, when a chair position opens up, the Dean of the School in which the chair presides will canvass the department's faculty members for their consensus on a replacement. The Dean will consult with department faculty to solicit nominations for a new Chair. Engineering Professor Morris testified that, in his experience, the Dean will usually have one or two people in mind for the position before speaking with faculty members. After discussing the matter with department faculty, the Dean will convene a meeting of the entire departmental faculty. At that meeting, the Dean will propose a candidate to the department, and the department will vote for or against by secret ballot. If approved, the Dean takes the candidate's name forward to the President, for ratification. President Scanlan, throughout his tenure with the College, has accepted all 56 recommendations for department chair. On occasion, when no suitable candidate emerges from the pre-existing faculty, department chairs are brought in from outside the College. They are hired in the same manner as other tenure-track faculty.

Tenure and Promotion

The Faculty is involved in the tenure and promotion process at almost every level. Application procedures are set forth in the Faculty Handbook, and they are the same whether the faculty member is applying for tenure or promotion.¹⁶ The criteria for tenure and promotion are also substantially identical: faculty members must demonstrate

¹⁶ The College has four faculty ranks Instructor, Assistant Professor, Associate Professor, and Professor.

a commitment to the College, to teaching and scholarship, and show service to the campus community.

When a faculty member is up for tenure or promotion, he or she begins the application process by completing an exhaustive form detailing his or her educational background, academic accomplishments, service to the community, and other achievements. The applicant then submits this form to his or her department chair, who in turn distributes it to the tenured faculty of the applicant's department, along with student evaluations and peer observations. The department then completes its own form, soliciting the opinion of tenured faculty members on the candidate's application. Consultation with untenured faculty is permitted, as well. The department faculty also takes an official vote on whether the candidate's application should be granted and the department chair is required to write a summary evaluation of the candidate. The Dean of the candidate's school may also write an evaluation. Once the departmental component is completed, the entire application is assembled and forwarded to the College's Committee on Promotion and Tenure. Neither the department nor the Dean has the right to prevent an application from reaching the Committee.

The Committee is comprised of 17 members, including 11 tenured faculty appointed by the Council for Faculty Affairs, the 5 Deans, and the Provost. The Committee meets once a year during the Spring semester, and carefully reviews each application. As each application is reviewed, the Committee discusses the applicant. After every committee member has had an opportunity to present his or her opinion on the applicant, the Committee takes a secret ballot vote. After all the applications are reviewed, any committee member may ask the Committee to reconsider an earlier vote. In fact, the evidence demonstrated that the Committee, as a matter of course, reconsidered every negative vote. There was no suggestion from either the College or

the Petitioner that members of this committee approach their duties with anything but complete professionalism.

After the Committee has voted, the Provost informs unsuccessful candidates that his or her application has been rejected by the Committee. At that point, the candidate may appeal to the President of the College for reconsideration. The President will in turn refer the request for reconsideration to a special appeals subcommittee of the main Committee on Promotion and Tenure. The subcommittee will review the appeal to determine whether it provides new information, describes a change of circumstances or points out a misinterpretation of data from the candidate's record. If the subcommittee finds that any of these circumstances exist, it will refer the candidate's application back to the main Committee to reconsider in light of the changed circumstances. The full Committee may then vote to grant tenure or promotion (and thereby forward the candidate's name to the President), or to deny the application. If it denies the promotion or tenure the matter will end.

The Provost is also responsible for transmitting the Committee's positive recommendations to the President for his review. As set forth in the Faculty Handbook, the Committee acts in an advisory capacity to the President. In practice, however, the President has adopted almost all of the Committee's recommendations on promotion and tenure. Through 1996, the President adopted all 98 decisions to promote, and 49 of 50 decisions to grant tenure.

On at least two occasions, however, the President has acted outside traditional channels in making promotion and tenure decisions. In 1990, Brother John Muller, a tenured Assistant Professor, ended his service as an Executive Vice President of the College, a position he had held for many years. Upon his return to the academy,

President Scanlan unilaterally promoted him to Associate Professor, outside the normal promotion channels and without consulting the Committee on Promotion and Tenure. The faculty immediately objected. In that instance, individual members signed a petition, the President was required to justify the decision at public meetings, and the Council for Faculty Affairs urged a meeting with the President to register its displeasure. President Scanlan maintained that the case of an administrator "retreating" to the faculty was not covered by the procedures in the Faculty Handbook. He further maintained that the right to give promotions in academic rank outside the process described in the Faculty Handbook was "within the discretionary authority invested in the Office of the President." President Scanlan resolved the matter by apologizing for causing tumult in the college community, and agreeing to abide by handbook procedures for faculty promotion in the future. Since that promotion, in 1990, there have been no promotions that have not followed the model set forth in the Faculty Handbook.

President Scanlan advised the CFA in 1990 that he would "closely scrutinize" a close or tie vote on tenure. More recently, in 1996, the Committee on Promotion and Tenure recommended for tenure to the President two candidates whom the Committee had only endorsed by 9-8 votes. The President declined to follow the Committee's vote, however, and denied tenure to the candidates, concluding that a one-vote margin was an insufficient endorsement to justify a lifetime employment commitment. Professor Plaskow, Chair of the Promotions and Tenure Committee, questioned the President on his denial, and was told not to expect automatic approval of every recommendation. Professor Plaskow then pointed out to President Scanlon that another candidate had been voted tenure by an even narrower margin than the two who had been denied tenure (because the candidate was currently serving as Dean, several members of the committee had abstained from voting, resulting in a plurality rather than a majority of

votes favoring tenure.) According to Professor Plaskow's testimony, the President replied that he would have tenured that candidate regardless of the recommendation of the Committee.

The President's denial of tenure to these recommended faculty also highlighted the fact that, while an unsuccessful candidate could seek review of Committee action, no procedure existed for appealing a presidential denial of tenure. Thus, the President and the Committee decided to treat presidential denials of tenure or promotion as if the Committee had rejected the candidate. Thus, both denials of tenure were sent back to the Committee on Promotion and Tenure's internal review subcommittee for reconsideration. In one of the two cases, the subcommittee clarified certain evidence in the candidate's application, and recommended that the Committee officially reconsider the application, which it did. When that application was favorably reported to the President for the second time, he granted tenure. As to the other applicant whom the President had denied, however, the appeals subcommittee found no new reason to reconsider his application, and the President's earlier denial of tenure stood.

Non-Reappointment of Faculty and Termination of Services

When faculty are hired into tenure track positions, they are on probationary status, until they apply for tenure in seven years. During this period, annual reappointment to their teaching position is generally assumed, however circumstances may occur where the College declines to reappoint probationary faculty to their position. This can occur because of a department's poor financial situation or low enrollment, or as a result of exceptionally poor work performance by the faculty member. The decision to issue a letter of non-reappointment is made by the Dean in consultation with, and sometimes at the suggestion of, the faculty member's department chair and faculty. For

example, Dean Brown recalled two occasions when a department chair had advised him that a junior faculty member should not be appointed. In the first of these cases, the chair sent a letter, as required by the Faculty Handbook, giving notice of the non-reappointment. In the second instance, the Dean recommended that the Provost issue the notice. After consultation, the Chair, Dean, the Provost concluded that such a procedure was appropriate. In the School of Arts, there were three letters of non-appointment issued related to declining enrollment. Dean O'Donnell made the decision to issue the notices of non-reappointment after consultation with the department chairs and other faculty. One of these situations involved a Professor of Religious Studies who, after returning from an unpaid leave of absence, received two consecutive letters of non-reappointment. The initial decision to not reappoint this Professor involved both the President and the Provost, and was opposed by the Religious Studies Department and the Dean. The Professor's letters of non-reappointment were later rescinded, because of unexpected faculty openings.

In more severe circumstances, the College may terminate the services of tenured faculty. The substantive basis and procedures by which the employment of a tenured faculty member may be terminated is set forth in the Faculty Handbook. Where a problem with a tenured faculty member is observed -- whether it be incapacity to teach, poor performance, or moral turpitude -- charges are referred to the College's Termination of Services Committee, which conducts an evaluation and makes a formal recommendation to the President on whether to institute formal termination proceedings. The Termination of Services Committee is comprised of five-elected faculty members not above the administrative level of department chair. If the Termination of Services Committee recommends formal termination proceedings and the President agrees, the President convenes a formal panel to hear the charges against the faculty member. The

hearing panel consists of five faculty members drawn from the elected tenured members of the Council for Faculty Affairs: two are selected by the President, two are selected by the accused faculty member, and the four selected members choose their fifth. In recent years, the faculty has twice referred colleagues to the Termination of Services Committee. In both cases, an informal resolution resulting in the resignation of the faculty member was reached after the Termination of Services Committee recommended proceeding to a full hearing.

Faculty Grievance Committee

The Faculty Grievance Committee is established in the Faculty Handbook, and is composed of five elected tenured faculty members not above the level of department chair. The Grievance Committee has jurisdiction over most matters of faculty employment, with the exception of tenure, promotion, and dismissal decisions. Thus, salaries, teaching assignments, procedural irregularities in tenure and promotion decisions, and office assignments are all concerns of the Grievance Committee.

Although the Committee has the authority to investigate and review grievances, it has no power to resolve them. Rather, its charge is limited to investigating the claim, making a preliminary finding as to whether the grievance has merit, and referring the grievance to the appropriate administrative office or attempting to mold an informal settlement between the aggrieved parties. Religious Studies Professor John Keber testified that in his three years as a member and Chair of the Grievance Committee, it had considered approximately four faculty grievances. Two of them involved faculty complaints that they were unfairly denied merit pay bonuses. The Grievance Committee considered the grievances and referred them to the appropriate administrative bodies. As the College notes, however, at the time of the Committee's recommendation, there

was no substantive remedy available to the grievants inasmuch as the available merit pay bonuses had already been distributed (this system is discussed in greater detail below). At the hearing, Professor Keber expressed his frustration that the Grievance Committee merely had the power to make recommendations to the persons or bodies that were the subject of a grievance, rather than implement any action. There appears to be no procedure available for an appeal from the administration's denial of a grievance found to be valid by the Grievance Committee.

Faculty Salary and Benefits

Under the auspices of the Council for Faculty Affairs is the Faculty Welfare Committee. The Committee consists of six faculty members appointed by the CFA to lobby the administration for better wages and benefits on behalf of the faculty. This Committee deals with the Provost, the Vice-President for Human Resources, the Vice-President for finance, the Comptroller and the President. In 1988-89, the Faculty Welfare Committee successfully worked with the administration to develop a new salary plan for faculty. This plan had three major elements: 1) the implementation of College-wide average salaries by rank; 2) the creation of hiring salary minima by groupings of teaching disciplines; and 3) the creation of fixed salary increments for continuing salary, such as upon promotion in professorial rank. The system further contemplated that two additional features: a system for merit increments and a method for dealing with unsatisfactory performance were to be subsequently developed. While a system to review unsatisfactory performance was never developed, the welfare committee, in conjunction with the CFA, developed a merit pay system, accepted by the Administration. Awards were determined by a Merit Pay Committee, consisting of ten faculty members, the academic Deans and the Provost, which was empowered to make ten awards of \$2,000 each. The Faculty members were eligible to apply on a three-year

rotation plan which divided the faculty into three groups. In 1992, the CFA, acting upon the recommendation of the Faculty Grievance Committee, voted to eliminate the merit pay program because of concerns about whether it could be administered on an equitable basis. As noted above, resolutions of the CFA proceed to the President for further action. Although witnesses for the College testified that they did not agree with the CFA's position on the merit pay issue, apparently that body's recommendations were ultimately approved or deemed approved, and the merit pay system eliminated.

The College also created an ad hoc Committee on Finances and Enrollment to deal with its financial crisis during the 1991-92 academic year. This committee worked for over a year on admissions and financial issues relating to the College's downturn in enrollment. However, favorable financial projections, largely relating to anticipated cash-flow savings as a result of debt restructuring, failed to materialize and the Administration concluded that it could not finance an expected faculty salary increase. As a result, the Ad Hoc Committee's faculty membership resigned in protest.

Faculty who worked on these committees felt as if the administration treated their meetings as purely information encounters, rather than true negotiation sessions. Further, evidence in the record demonstrated that the administration took a number of financial actions without consulting the faculty, such as changing the method of calculating contributions to faculty pension accounts and reducing faculty health benefits. Additionally, the College unilaterally established a retirement incentive package available only to members of the School of Engineering faculty. However, the record does establish that the Faculty and the Administration have collaborated in other matters relating to faculty welfare. A new retirement policy for full-time faculty and administrators was developed permitting, among other things, early retirement for faculty who want to maintain a part-time teaching load and retain their benefits. This policy was

developed by the Administration at the request of, and in consultation with the Faculty Welfare Committee. Additionally, when it became apparent that the existing faculty tuition benefit plan had certain difficulties, the Committee worked with the Administration to develop a new plan, which was approved by the CFA and the College.

Budgeting

The budgeting process begins on the departmental level. Department chairs draft operating budget requests for their departments, with the input of their Dean. Those requests are delivered to the Administration's Finance Office, which either approves or modifies it. If the request is modified, the Finance Office gives the department a flat amount for it to spend at its own discretion. For major capital expenditures, in the School of Science for example, departmental faculty draft their "wish lists," which is referred to the Dean's Council. The Dean's Council discusses the departmental requests, prioritizes them, and sends its prioritized "wish list" to the Provost. The Provost then approves or rejects the requests. Some departments also have "gift" or discretionary accounts that they may use as they wish.

Sabbaticals and Summer Grants

Sabbaticals are grants of paid leave to faculty members for the purpose of pursuing scholarly opportunities. The Faculty Handbook sets forth the basis terms for receiving a sabbatical. The College has created a Committee on Sabbaticals consisting of 8 faculty members, who are appointed to the committee by the Council for Faculty Affairs. The Committee reviews faculty applications for sabbaticals, both full year and half year, and makes recommendations to the President. Throughout his tenure as president, President Scanlan has accepted all 141 sabbatical recommendations awarded by the Committee. The record also establishes that over the years, the

Administration has accepted proposals advanced by the Faculty Welfare Committee that the number of authorized sabbaticals be increased and that the period of time a faculty member had to wait to qualify be decreased.

In 1994, however, the President decided that the Sabbatical Committee's grant, for a second year in a row, of twelve half-year sabbaticals and no full year sabbaticals was too expensive for the school and sought to implement a less generous sabbatical policy.¹⁷ He then refused to approve any sabbaticals until the faculty and the administration negotiated a new formula for the granting of sabbaticals. A committee was then organized through the Council for Faculty Affairs, comprised of five members of the CFA, the academic Deans (who had varying degrees of involvement), the President and the Provost. This committee developed several policy alternatives for the granting of sabbaticals. Those alternatives were then presented to an all-faculty meeting which voted on the different proposals. The favored proposals were referred to the President, and the Council for Faculty Affairs drafted appropriate language, which was then approved and inserted into the current draft of the Faculty Handbook.

Petitioner presented evidence that, on at least two occasions, the College has granted paid leave to faculty outside the traditional sabbatical grant procedure. In both instances, the Provost made a determination to support the scholarly endeavors of one particular faculty member by granting him an accommodation for paid leave.

The College also gives faculty monetary grants to support their research and scholarship during the summer months. Recipients of these funds are chosen by the Committee on Summer Grants, which consists of six members appointed by the CFA.

¹⁷ Full-year sabbaticals are far more cost effective for the institution than half-year leaves.

The Committee members review the faculty members' grant proposals, select the most promising ones, and forward recommended recipients to the President. The President has awarded all 70 of the summer grants the Committee recommended to him.

In addition to the above programs, certain Schools have instituted their own efforts to enhance the scholarship of the faculty. For example, in support of its efforts to obtain professional accreditation by the American Assembly of Collegiate Schools of Business ("AACSB") the School of Business established a bonus system for faculty members who published in scholarly journals, referred to as "peer reviewed" publications. Additionally, the Capalbo Professorship, named after its grantor, which carries with it a financial stipend and a teaching workload reduction, is awarded annually to a faculty member for exemplary scholarship. The decision on the recipient of the award is generally made by the department chairs of the business school. If a department chair is under consideration, his or her place on the committee is assumed by a faculty member.

Teaching Loads

As set forth in the Faculty Handbook, the normal teaching workload for full time faculty is twelve lecture hours per week. If a professor is teaching a graduate course, the maximum workload is only nine lecture hours per week. These standards have been in effect since at least 1965. When problems arose regarding the teaching load and compensation for faculty teaching graduate courses during the summer, the Council for Faculty Affairs made proposals -- accepted by the President -- which effectively raised faculty compensation for teaching summer courses.

Occasionally, faculty members receive Reduced Teaching Loads (RTLs). Mostly, these RTLs are given to faculty carrying out special administrative duties, such

as department chairs, program directors, and laboratory managers. Some RTLs, however, are distributed to faculty to allow them extra opportunities during the semester to pursue scholarship and research opportunities. Schools have a fixed number of these research RTLs, and they distribute them in different manners. The School of Arts, for example, has a Reduced Teaching Load Committee that reviews faculty applications for RTLs. The RTL committee consists of the Dean and four department chairs elected by the faculty; the Dean votes only to break a tie. Decisions of this committee are final. In the School of Science the Dean's Council, which is already responsible for curricular decisionmaking, considers faculty requests for RTLs. Differing from both Arts and Science, the School of Business has delegated the authority to distribute RTLs to its departments, who make recommendations to the Dean. The Department of Economics and Finance has therefore developed an application form and specific criteria for RTL applications, which are evaluated by its Department Chair and Research Committee. The Marketing and Management Department has asked a committee of prior RTL recipients to review the applications of their potential successors.

Class schedules are coordinated on a departmental level; and generally are the responsibility of the department chair, who circulates the proposed schedule among the faculty. In certain departments faculty is asked to specify their scheduling preferences. The Dean's office then reviews proposed schedules to ensure that classes from one department do not conflict with those in other departments that are common to students at a particular level. Faculty members may have discretion to accept or reject "overload" schedules (teaching extra courses for additional compensation.)

The College Library

The College's library system is treated as if it were another school in the academic structure. Professional librarians are accorded status as faculty and academic rank, and may participate in the various institutions of governance such as the CFA, the College Senate, and their committees. It is noted that the Petitioner has sought to include the professional librarians within the proposed unit.

Included in the proposed unit are the College's seven librarians who are supervised by the College's Director of Libraries: an Assistant Director of Libraries, a Periodicals Librarian, a Cataloguing Librarian, two Public Services Librarians, an Engineering Librarian, and a Reference and Systems Librarian. These librarians are responsible for managing the libraries' book and periodical budget; maintaining the libraries' catalogs and web site; teaching certain non-credit classes about how to use the libraries' facilities; setting terms for borrowing and using books and other materials; setting fines for overdue books; and, with the help of appropriate faculty, acquiring new books and magazines for the libraries.

Librarians are eligible for promotion¹⁸ and tenure. They must apply with the faculty Committee on Promotion and Tenure, and follow the same procedures as regular faculty members. The Director of Libraries has modified the forms that applicants for promotion or tenure must complete to better reflect a librarian's duties and responsibilities. The Director of Libraries functions as a Dean/Department Chair during this process, and signs off on the departmental material that must be transmitted to the Committee on Promotion and Tenure.

¹⁸ There are four ranks for librarians: Assistant Librarian I, Assistant Librarian II, Associate Librarian, and Librarian.

In addition to its professional librarians, the College's library system employs a support staff of approximately 20 to 25 employees in the acquisitions, cataloguing, public relations/circulation, periodicals and engineering departments. Most of these staffers report to the librarian who is responsible for that particular department and who is additionally responsible for assigning work to them, monitoring their progress, and completing their annual evaluations. The professional librarians, although they do not have hiring authority, do have the responsibility to identify staffing needs in the library. They interview candidates and make a hiring recommendation to the Library Director. Similarly, the professional librarians make recommendations for internal staff promotions and salary increases.

ANALYSIS

A. Supervisory Status of Department Chairs and Professional Librarians

As noted above, the Employer primarily contends that the faculty, on whole, is managerial, relying on *NLRB v. Yeshiva University*, 444 U.S. 672 (1980) (hereinafter "*Yeshiva*") and its progeny. At hearing, the College noted that because the Supreme Court found the Yeshiva faculty to be managerial, it did not resolve the supervisory issue with regard to the faculty; however the College took the position at hearing, which it supplemented on brief, that certain members of the teaching faculty, particularly department chairs and program directors and professional librarians, exercised additional responsibilities within the supervisory framework, including employment-related functions for adjunct faculty, and technical, clerical and support staff. The Petitioner took no position with regard to the supervisory status of these job classifications.

Section 2(11) of the Act defines a supervisor as:

Any individual having authority, in the interest of the Employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward or discipline other employee, or responsibly direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the exercise of independent judgment.

It is well established that Section 2(11) of the Act must be read in the disjunctive and, therefore, an individual need possess only one of the enumerated criteria to find that such status exists. *Concourse Village, Inc.*, 276 NLRB 12 (1985). However, this grant of authority must encompass the use of independent judgment on behalf of management. *Hydro Conduit Corp.*, 254 NLRB 433, 441 (1981). The party alleging supervisory status bears the burden of establishing that such status, in fact, exists. *Ohio Masonic Home, Inc.*, 295 NLRB 390, 393 fn.7 (1989). Mindful that a finding of supervisory status removes an individual from the protection of the Act, the Board avoids attaching to Section 2(11) too broad a construction. *Adco Electric, Inc.*, 307 NLRB 1113, 1120 (1992), *enfd.* 6 F.3d 1110 (5th Cir. 1993). The Board has noted that, in enacting Section 2(11) of the Act, Congress stressed that only persons with "genuine management prerogatives" should be considered supervisors, as opposed to "straw bosses, leadmen....And other minor supervisory employees." *Chicago Metallic Corp.* 273 NLRB 1677 (1985)(citing Senate Rep. No 105, 80th Cong., 1st Sess., 4 (1947), *aff'd* in relevant part 794 F.2d 527 (9th Cir. 1986). Thus, "whenever the evidence is in conflict or otherwise inconclusive on particular indicia of supervisory authority, [the Board] will find that supervisory status has not been established, at least on the basis of those indicia." *Phelps Community Medical Center*, 295 NLRB 486, 490 (1989).

In the instant case, the record establishes that the positions of department chair and professional librarian are supervisory. The record clearly establishes that faculty who occupy the position of department chair have the authority to hire adjunct

personnel, and have done so on a consistent basis. Additionally, they have the authority to responsibly direct the work of the adjunct faculty by determining what courses they will teach. Moreover, the record establishes that the department chairs possess the authority to effectively recommend that adjunct personnel not be rehired.¹⁹ Faculty who exercise such individual authority as department chair revert to regular faculty status after their terms expire, and conversely, many faculty members may have a reasonable expectation that they too may serve in such a capacity. It is well-settled, however, that the mere possibility of a promotion to a supervisory position in the future does not, by itself, warrant exclusion from the unit. *Weaver Motors*, 123 NLRB 209 (1959).

With respect to the program directors, I find that, in accordance with the principles enumerated above, the record fails to support a determination that they are supervisors within the meaning of the Act. While generally the testimony of various witnesses refers to faculty members occupying these positions in the same context as department chairs (for example, in connection with their participation in curriculum committee meetings in the various schools), there is no record evidence that faculty members occupying these limited number of positions actually hire adjunct or other personnel or responsibly direct their work. Thus, while program directors may serve an analogous function to the chairs, the evidence of their supervisory status is, at best, vague and equivocal. Mindful of the Board's preference for according Section 2(11) a narrow construction, I find that the Employer has failed to meet its burden of establishing that the program directors are supervisors within the meaning of the Act.

With respect to the Professional Librarians, as noted above, the unrebutted record evidence demonstrates that the Library faculty members effectively recommend

¹⁹ As discussed below, department chairs additionally sit on committees which develop academic policy.

the hiring and personally are responsible for evaluating the non-professional staff. Additionally, they are responsible for the day-to-day supervision and effectively recommend promotions and salary increases for the staff members who report to them. Thus I find that the Employer has met its burden of establishing that the Librarians are supervisory employees within the meaning of the Act.²⁰

B. Managerial Status of Faculty

The Employer contends that the instant petition must be dismissed because the faculty members of the College are managerial employees. The College contends that its faculty effectively determines and implements the academic policies and operations of the institution; makes effective recommendations with regard to academic personnel matters and has a significant role in determining or carrying out many of the College's related activities. Petitioner contends that authority over academic and non-academic decision-making is not vested in the faculty, but rather in the Board of Trustees or some member of the College's Administration.

The Board has held that the party seeking to exclude either a whole class of employees or particular individuals as managerial has the burden "to come forward with the evidence necessary to establish the exclusion." *Montefiore Hospital and Medical Center*, 261 NLRB 569 (1982); In *Yeshiva* the Supreme Court found that faculty members at that institution were managerial employees excluded from the Act's coverage. The Court noted that managerial employees were those who "formulate[d] and effectuate[d] management policies by expressing and making operative the decisions of their employer." *Id.* at 682 (quoting *NLRB v. Bell Aerospace Co.*, 416 U.S.

²⁰ In its brief, the Employer additionally urges that the Faculty, as a whole, possess supervisory authority. This contention is dealt with below.

267, 288 (1974)). Further, the Court noted, managerial employees "exercise discretion within, or even independently of, established employer policy and [are] aligned with management . . . by taking or recommending discretionary actions that effectively control or implement employer policy." Id. at 683.

Thus, because it concluded that "the faculty [at Yeshiva] determines within each school the product to be produced, the terms upon which it will be offered, and the customers who will be served," the Supreme Court held that the faculty members were employees involved with managerial policy making, and thus outside the protection of the Act. Id. at 686. Specifically, the Court found that, through faculty-wide meetings and participation on faculty committees, the faculty at each of the Yeshiva University schools effectively determined curriculum, grading systems, admissions, matriculation standards, academic calendars, and course schedules. In addition, faculty at some schools made decisions regarding admission, expulsion, and graduation of individual students, and others had made decisions involving teaching loads, student absence policies, tuition, enrollment levels, and, in one case, the location of a school. The Court found that the faculty's control over academic matters was absolute. In nonacademic areas, the Court found that the faculty made recommendations regarding hiring, tenure, sabbaticals, terminations, and promotions. Most of its recommendations in this area had been implemented. Id. at 676-77. Although the Court relied primarily upon the faculty's extensive authority over academic affairs, it also noted its significant control in nonacademic areas, and approved the Second Circuit's conclusion that faculty members were substantially and pervasively operating the college.

The Court rejected the argument that the faculty was nonmanagerial because its decisions were either subject to the approval or veto of a higher authority. Rather, the Court noted that occasional vetoes of faculty action, usually due to concerns with

"scarce resources and University-wide balance, . . . in no way detract from . . . the academic responsibilities entrusted to the faculty." Id. at 688 n.27. As the Court noted, "the relevant consideration is effective recommendation or control rather than final authority." Id. at 683 n.17. Thus, in light of all of the above, the Court concluded:

The controlling consideration in this case is that the faculty of Yeshiva University exercise authority which in any other context unquestionably would be managerial. Their authority in academic matters is absolute. They decide what courses will be offered, when they will be scheduled, and to whom they will be taught. They debate and determine teaching methods, grading policies, and matriculation standards. They effectively decide which students will be admitted, retained, and graduated. On occasion, their views have determined the size of the student body, the tuition to be charged, and the location of a school. When one considers the function of a university, it is difficult to imagine decisions more managerial than these. Id. at 686.

It is undisputed that Manhattan College's faculty members are "professional employees" within the meaning of Section 2(12) of the Act. Professional employees are specifically included in the coverage of the Act and are entitled to the benefits of collective bargaining. However, representational rights are not available to those professional employees who fall under the judicially implied exclusion for "managerial employees." In *Yeshiva*, the Court declined to adopt a per se rule finding all faculty to be managerial; but rather held that each case was to be considered on the basis of its own facts:

We certainly are not suggesting an application of the managerial exclusion that would sweep all professionals outside the Act in derogation of Congress' expresses intent to protect them. The Board has recognized that employees whose decision making is limited to the routine discharge of professional duties in projects to which they have been assigned cannot be excluded from coverage even if union membership arguably may involve some divided loyalty. Only if an employee's activities fall outside the scope of the duties routinely performed by similarly situated professionals will he be found aligned with management. We think these decisions accurately capture the intent of Congress, and that they provide an appropriate starting point for analysis in cases involving professionals alleged to be managerial. 444 U.S. at 690.

Specifically, academic faculty may not be excluded as managerial merely because they determine the content of their own courses, evaluate their own students and supervise their own research.

In considering the Supreme Court's *Yeshiva* decision, The Board has placed particular emphasis on faculty roles in academic spheres, finding faculty members to be managerial even when they play no major role in nonacademic decision making. See *University of Dubuque*, 289 NLRB 349, 352 (1988) (concluding that the faculty was managerial based solely on its involvement in academic matters); *Livingstone College*, 286 NLRB 1308, 1314 (1987) (finding managerial status where the faculty, through committee membership, had effective control over most major academic matters, but little control over nonacademic matters such as hiring, tenure, and budgeting). To determine managerial status, therefore, the Board looks to faculty involvement in the development and administration of academic concerns and faculty participation in the formulation of academic policy. See *Elmira College*, 309 NLRB 842, 849 (1992); *Lewis and Clark College*, 300 NLRB 155, 161 (1990); *University of Dubuque*, 289 NLRB at 352; *Livingstone College*, 286 NLRB at 1314; *American Int'l College*, 282 NLRB 189, 201 (1986). Even where the faculty's control over academic matters was not absolute, but rather subject to administrative approval or veto, the Board has nevertheless found managerial status so long as the faculty's decisions were made effective most of the time. See *American Int'l College*, 282 NLRB at 201, 202; *Duquesne University of the Holy Ghost*, 261 NLRB 587, 588 (1982). A faculty's influence, or effective recommendation, in tenure, hiring, and other nonacademic matters by themselves has been held to be not determinative of managerial status, *University of Great Falls*, 325 NLRB No. 3., slip op. at 11 (Nov. 8, 1997) ("Faculty authority in nonacademic matters is

accorded less weight in determining whether faculty are managerial employees"); see also *Lewis & Clark College*, 300 NLRB at 161, n. 30.

In the instant case, it is not disputed that faculty members sit on numerous committees, which operate either by consensus, or by majority rule, to generate recommendations regarding a host of matters relating to the life and functioning of the College. The issue is fundamentally, whether faculty participation on these committees constitutes "effective recommendations" by which the Faculty, as a body, exercises managerial authority over the College.²¹

It is additionally not disputed that, at Manhattan College, faculty members and their departments are responsible for initial course development. They develop the subject of the course, its goals, the syllabus, the level of the course, to whom it will be taught and the texts to be used. In most schools, the course approval process ends at the departmental level. Once a course is approved, faculty may modify, revise, and update it without any securing approval from any higher body. Additionally, faculty members are individually responsible for grading their own courses, and have almost absolute control over the grades they give to students. However, as has been held in *Yeshiva*, and its progeny, such authority, absent more, is not determinative of managerial status.

Additionally, department faculty establish the course requirements for majoring and minoring in the various degree programs within their department, and set the minimum grades that students will need to graduate. However, the record establishes

²¹ The *Yeshiva* Court specifically noted that the Board failed to advance the argument that the role of the faculty was merely advisory, and thus not managerial. The Court distinguished between situations where faculty authority is advisory and where faculty effectively recommends action, notwithstanding the administration's rarely exercised veto power. 444 U.S. 684, fn. 17.

that this academic decisionmaking requires approval from various curricular committees that (with the exception of the School of Arts) are comprised of department chairs and the academic deans.²²

Although minutes from department meetings demonstrate that department chairs solicit input from their colleagues before casting votes on curricular issues, the record establishes that through their membership on the various school-wide curricular committees the department chairs play a major role in establishing academic policy for their respective Schools in the areas of graduation requirements, development of new degree programs, approval of departmental course proposals, writing guidelines for course development, and preventing intra-school course duplication. Thus, it appears from the record that while faculty consultation and collaboration is the norm, academic policy decisions are largely made through committees comprised of supervisory and administrative personnel.

The record establishes, as the College contends, that the Faculty also plays a role in setting College-wide academic policy. However, the body predominantly responsible for generating such policy is the Educational Affairs Commission. This group considers matters central to the College's academic life, such as College-wide curricular offerings, new programs of instruction, degree requirements, admissions standards, academic standing and graduation requirements, standards for majors, minors and electives, policies concerning off-campus courses, grading systems, attendance policies and the like. This Commission has minority faculty membership and, is required, prior to implementing any proposal, either to receive approval from the Provost (who sits on the

²² As regards the School of Arts, the record establishes that the Dean's Council, comprised of the Dean, department chairs and program directors, considers issues of overlapping jurisdiction with the faculty-composed Curriculum Committee. Additionally, as the Committee's Constitution provides, its recommendations are subject to the Dean's approval.

Committee) or submit its recommendations to the Senate for approval. Similarly, the College Senate is comprised of various constituents of the college community, and faculty members do not constitute a majority. The Senate's other standing commissions similarly contain minority faculty representation. Moreover, the powers of the Senate are specifically limited: it has the power to "initiate, formulate and recommend proposals affecting College policy to the President and Board of Trustees." Thus, by the terms of its Constitution and By-Laws, the Senate functions to the President and the Board of Trustees in an advisory capacity.

The Board has held managerial status is not defeated simply because faculty decisionmaking is occasionally constrained by the administration's power to veto faculty decisions. See *University of Dubuque*, ("absolute authority [over academic matters] is not a prerequisite for managerial authority"), and as the College notes, the College Administration has only rarely disagreed with the recommendations put forward by the academic governance bodies. However, in the instant case it cannot be said that the Faculty effectively controls the actions of the College Senate, the Educational Affairs Commission or the recommendations these governance bodies put forward to the Administration. While the Board has previously held that faculty is managerial where "it exercises control over curriculum and academic policy through faculty participation in the various curriculum committees" *American International College*, 282 NLRB 189, 201 (1986), it has also been held that "[d]ecisions or recommendations made by committees only a minority of whose members consist of faculty representatives cannot be said to be faculty decisions or recommendations." *University of Great Falls*, 325 NLRB No. 3., slip op. at 13 (Nov. 8, 1997).²³ See also *Cooper Union*, 273 NLRB 1768 (1985), enf'd 783

²³ In *University of Dubuque*, supra, the Board found faculty to be managerial, in part, based upon faculty minority representation on committees. However, in that case the Board also found that the faculty was vested with the exclusive right to set academic policy in numerous

F.2d 29 (2d Cir. 1986)(in finding faculty to be nonmanagerial Board relied, in part, on evidence that the faculty constituted either a minority or something less than a voting majority on most governance committees). Thus, it cannot be said that the Faculty, rather than some amalgam of College constituencies, exercises effective control over the either the work of the Senate, any of its standing commissions, or subsequent Administrative ratification of its proposals. Under these circumstances, while it is clear that the faculty has an obvious and pervasive influence on curricular and academic life at the College, their lack of majority representation on committees empowered to create academic policy militates against finding them managerial employees.

The College points to a number of areas, outside the realm of academic policy, in which the faculty is said to exercise or have exercised effective control. However the record establishes that the College views the faculty's role as largely advisory in such matters. In particular, the College points to the Faculty's role in the reorganization of the College. The record does not support the College's contention that Faculty sentiment trumped the Administration preference for a three-school model. It is true, as the College contends, that extensive surveys of Faculty opinion were conducted and the Board of Trustees eventually did approve the reorganization plan that had majority Faculty support. However, the original reorganization model proposed by the Administration was withdrawn from consideration at the time the proposals were circulated. Moreover, the Board of Trustees also made it clear that it considered that the Faculty's role in this context to be merely advisory. This position was articulated by the Board of Trustees

areas. For example, an extant collective-bargaining agreement gave the faculty the exclusive right to set student grading and classroom conduct standards; set degree requirements; recommend earned degree recipients; initially receive and consider new degree programs; and develop, recommend and ultimately approve curricular content and course offerings. *Id.* at 350. The composition of key governance committees was considered a relevant factor in *College of Osteopathic Medicine & Surgery*, 265 NLRB 295 (1982) and in *Cooper Union*, *supra*.

when the College Senate and the CFA requested that the Board refrain from taking determinative action with regard to the restructuring of the College before the Senate had the opportunity to complete its survey of faculty sentiment. The Board of Trustees unequivocally rejected the suggestion that it was obliged to consult with either body before taking action, and reminded the governance bodies that their role was to frame proposals for consideration by the Administration. Moreover, the Board reserved for itself the prerogative of deciding when consultation or collaboration with various faculty or other College constituencies would be appropriate. See *Bradford College*, 261 NLRB 565 (1982) (College president advised faculty in writing that they had no power to make academic or administrative policies; regional accreditation agency cited the faculty's lack of participation in academic decision making.)²⁴

In contrast to the faculty's lack of majority voice in the areas of academic policy, it falls within the province of faculty-dominated committees to make recommendations regarding distinctive features of academic life such as promotion and tenure, summer grants, sabbaticals, reduced teaching loads and the hiring and retention of tenure-track personnel, among others. These faculty recommendations have, the most part, been adopted by the College Administration. Of course, there have been times when such recommendations have been rejected. In particular, the President has indicated that he considers it his prerogative to function outside Faculty Handbook procedures under certain situations (as in the case of the "retreating administrator" and in the grant of tenure to an academic dean notwithstanding the recommendation of the Committee on

²⁴ Similarly, the College's contention that Faculty managerial status is evidenced by the CFA's role in the revision of the Faculty Handbook is unpersuasive. The record establishes that the revisions consisted either of stylistic and format changes, or the incorporation of policies which had been implemented since the prior version of the Handbook was promulgated, in 1979. There is no record evidence that, by these revisions, the CFA made or implemented new College policy.

Tenure and Promotion.) It is true that "the fact that the administration occasionally has made and implemented policy decisions without faculty input [does not] detract from the collegial managerial authority consistently exercised by the faculty." *Boston University*, 281 NLRB 798, 798 (1986), enforced, 835 F.2d 399 (1st Cir. 1987). However, the record also reflects the fact that the faculty members exercise little to no power in a wide variety of areas. For instance, the faculty plays no role in admissions (other than to recommend standards through their representatives on the College Senate); have no voice in setting tuition rates; do not control the disposition of the College's real property; do not award financial aid (except in limited merit-based scholarship situations); and do not determine the size of the student body, the academic calendar, the length of a normal class period (although the Educational Affairs Commission is currently reviewing class length), or the minimum faculty teaching load. Additionally, the record reflects that the faculty has very little power in setting the financial terms of their employment relationship or in the adjustment of grievances. Moreover, the fact that the Administration has largely conferred its approval on faculty recommendations in non-academic areas cannot in and of itself establish managerial status, absent some other indication of faculty power and control. It is clear that the faculty bring to bear their scholarship, expertise and diligent consideration of various matters relating to the academy and academic life. This high standard is obviously reflected in the Administration's approval of and deference to faculty recommendations.

In *Elmira College*, *supra*, relied upon by the Employer, faculty were held to be managerial where they had final authority for developing and approving new courses; approving changes in course levels, majors and minors, adding courses to the curriculum; setting credit hours, course content, curriculum, grading of students, admissions, student advising, transfer courses, minors and academic discipline. They

also effectively decided the hiring of full-time faculty, had authority with respect to the hiring of part-time faculty, effectively determined which faculty would receive tenure and participated in the hiring of the academic deans. Additionally, of significance to the Board in that case was a Middle States observation that the college had a "participatory process now in place...to ensure faculty participation in governance." The Faculty at Manhattan College, in contrast, as a distinct body, lacks authority in many of the areas enumerated above. Additionally, its Middle States review team noted quite the opposite: the general confusion regarding Faculty participation in governance.²⁵ Similarly, in *Lewis & Clark College*, supra, faculty members were found to be managerial when, through their participation in faculty-controlled committees, they exercised effective control of virtually all academic matters. For the reasons noted above, that cannot be said in the instant case. See also *Livingstone College*, supra, where faculty were found to be managerial based upon their control of academic and curricular policy including degree requirements, course content and selection, graduation requirements, matriculation standards.

In *Loretto Heights College*, supra, the Board found the faculty members not to be managerial based upon several factors. Central to the analysis therein was the determination that there was no faculty committee "empowered to direct the work of anyone or any group of persons. No committee or faculty member is authorized to take action on its own initiative, which is final and binding on Respondent." 264 NLRB at 1121(footnote omitted). The same analysis applies in the instant matter. The record fails

²⁵ The record demonstrates that the governance structure of the College historically has been, and remains, inchoate. This is reflected in the Middle States report which not only manifests uncertainty regarding the grievance structure of the institution, but contains salient observations of the accreditation team as to the College-wide understanding of the authority of the Provost, the President and the Board of Trustees.

to support a determination that the faculty, as a body, is empowered to commit the College to action or to develop policy independent of approval by the academic deans, the Provost, the President or the Board of Trustees, other than those matters pertaining directly to the conduct of classroom activities. Thus, the power and authority of the Manhattan College faculty is distinguishable from that enjoyed by the faculty in *Yeshiva*, where the Court, "was faced with a faculty with broad powers and an all encompassing ambit of authority." *Id* at 1119. Thus, while the record clearly establishes that the Manhattan College faculty have a substantial role in the development of policy in academic and other spheres, in light of all the above considerations, I conclude that this role is fundamentally advisory in nature. The record establishes that, apart from basic academic decision-making, academic policy is largely set by administrative and supervisory personnel or committees that do not have majority representation from among faculty members. Additionally, the College has specifically rejected the proposition that the Faculty have anything other than a consultative and collaborative role in other areas and has affirmed that the terms of their participation are subject to the discretion of the Board of Trustees. Moreover, the actual authority of the extant governance structures of the College is a matter of confusion to the Faculty; and by the very terms of the governance documents of the institution, Faculty action is subject to administrative ratification in virtually all instances. Recognizing that faculty action does not have to be controlling, I am left to consider what quantum of evidence is sufficient to deny employee status and thereby preclude the faculty from the rights and privileges of collective-bargaining under the Act. While the issue is close, upon balanced consideration, I find that the College has failed to sustain its burden of proof in establishing that the Faculty members are managerial personnel as set forth in *Yeshiva*

and its progeny. Rather, the record evidence supports a determination that the members of the Manhattan College faculty are employees within the meaning of the Act.²⁶

Accordingly, I find that the following employees, constitute an appropriate unit for collective bargaining within the meaning of section 9(b) of the Act:

All full-time and regular part-time teaching faculty employed by Manhattan College at its Riverdale, New York campus, excluding adjunct faculty, department chairs, professional librarians, all other employees and guards and supervisors within the meaning of the Act.

DIRECTION OF ELECTION

An election by secret ballot shall be conducted by the Regional Director, Region 2, among the employees in the unit found appropriate at the time and place set forth in the notice of election to be issued subsequently, subject to the Board's Rules and Regulations.²⁷ Eligible to vote are those in the unit who were employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during the period because they were ill, on vacation or temporarily laid off. Also eligible are employees engaged in an economic strike which commenced less than 12 months before the election date and who retained their status

²⁶ On brief, the Employer additionally argues that the College Faculty supervises laboratory assistants, stock room attendants, personnel hired from faculty-obtained grants, and departmental secretaries. This contention was not specifically raised at hearing and was not fully litigated. The scant, general and non-specific testimony regarding the supervision of these employees is not sufficient to meet the Employer's burden of establishing that the Faculty "use independent judgment in overseeing other employees in the interests of the employer" 444 U.S. at 682, n. 13.

²⁷ Please be advised that the Board has adopted a rule requiring that election notices be posted by the Employer "at least three full working days prior to 12:01am on the day of the election." Section 103.20(a) of the Board's Rules. In addition, please be advised that the Board has held Section 103.20(c) of the Board's Rules requires that the Employer notify the Regional Office at least five full working days prior to 12:01am of the day of the election if it has not received copies of the election notice. *Club Demonstration Services*, 317 NLRB 349 (1995).

as such during the eligibility period and their replacements. Those in the military services of the United States who are in the unit may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced.²⁸ Those eligible shall vote on whether or not they desire to be represented for collective-bargaining purposes by the Manhattan College Faculty Coalition, New York State United Teachers a/w American Federation of Teachers, AFL-CIO.²⁹

Dated at New York, New York
November 9, 1999

/s/Daniel Silverman
Daniel Silverman
Regional Director, Region 2
National Labor Relations Board
26 Federal Plaza, Rm. 3614
New York, New York 10278

²⁸ In order to assure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses which may be used to communicate with them. *North Macon Health Care Facility*, 315 NLRB 359 (1994); *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *NLRB v. Wyman Gordon Company*, 394 U.S. 759 (1969). Accordingly, it is hereby directed that within 7 days of the date of this Decision, 3 copies of an election eligibility list, containing the full names and addresses of all eligible voters, shall be filed by the Employer with the Regional Director, Region 2, who shall make the list available to all parties to the election. In order to be timely filed, such list must be received in the Regional Office at the address below, on **November 16, 1999**. No extension of time to file this list may be granted, nor shall the filing of a request for review operate to stay the filing of such list, except in extraordinary circumstances. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed.

²⁹ Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, Franklin Court, 1099 Fourteenth St., NW, Washington, DC 20570-0001. This request must be received by the Board in Washington by **November 23, 1999**.

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